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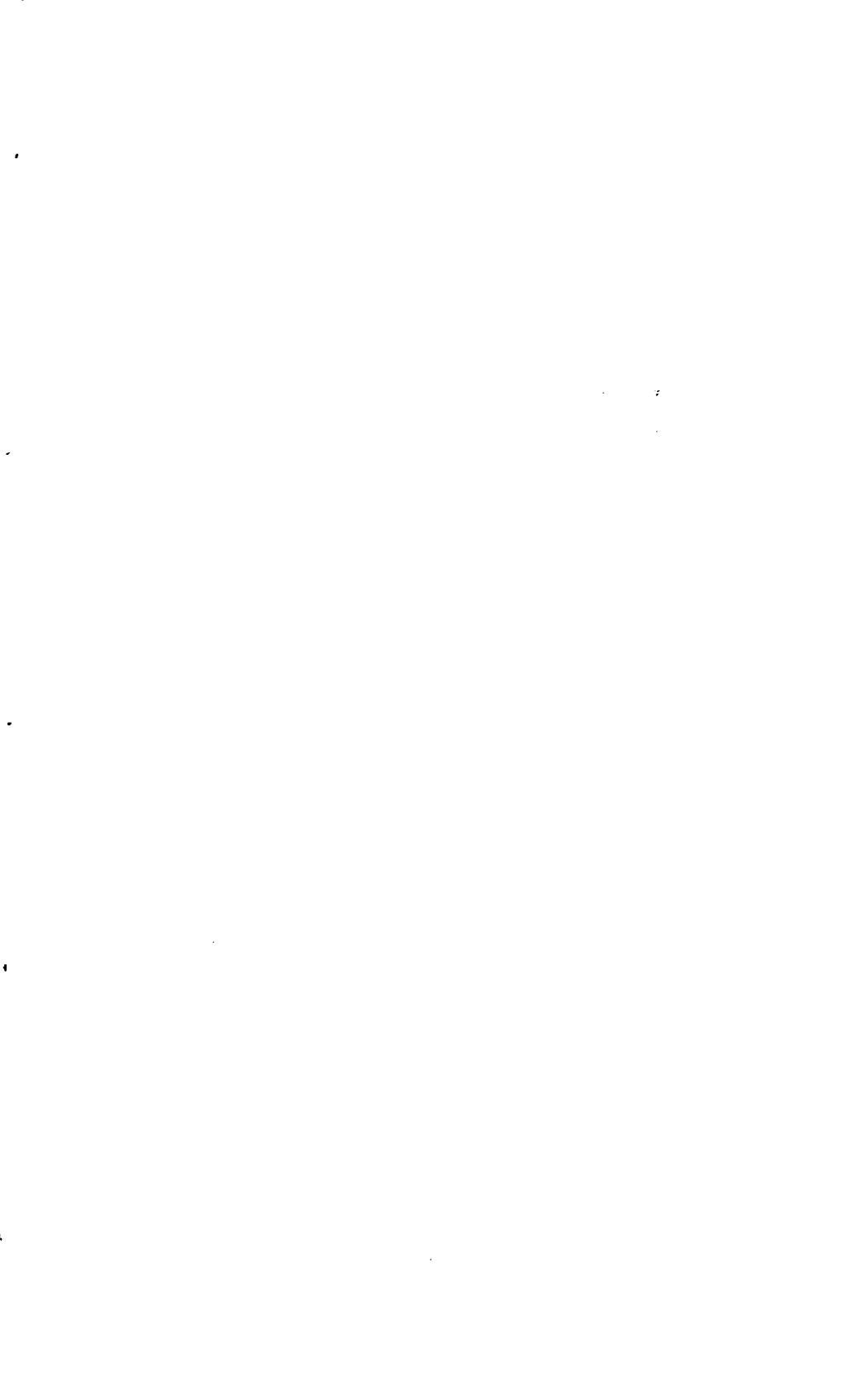
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REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
SUPREME COURT  
OF THE  
STATE OF IOWA.

OCTOBER 4, 1893—JANUARY 22, 1894.

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BY  
NATHANIEL B. RAYMOND.

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VOLUME IX,  
BEING VOLUME LXXXIX, OF THE SERIES.

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COLUMBIA, MO.:  
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*Rec. Nov. 30, 1895.*

## NOTE

My work as reporter of the decisions of the Supreme Court terminates with this volume. While I have endeavored to serve the profession to the best of my ability, I am conscious of many imperfections in the work, which, under some circumstances, might have been avoided, and which I hope will receive the charitable consideration of the profession. The delay in issuing the reports I have greatly regretted, but could not help. Coming into office with broken health, the four years of my term have been a constant struggle to regain strength, to which the work of the office has been a continuing obstacle. What seemed, from time to time, a reasonable hope of returning health, however, made me disinclined to give up a work that in many respects was most agreeable to me. I am obliged to leave to my successor the preparation of one volume which properly belonged to the work of my term, but he will doubtless be able to soon bring the work up to date. I am greatly indebted to Hon. E. C. Ebersole for valuable assistance upon volumes 87 and 88.

N. B. R.

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## IN MEMORIAM

---

JOSEPH M. BECK

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On the thirtieth day of May, 1893, the honorable Joseph M. Beck, for many years one of the justices of the supreme court, died at his home in Fort Madison. At the January term, 1894, the court having designated the eighth day of February for the presentation of resolutions to the memory of the deceased, Mr. Washington Galland read the following address on behalf of Hon. Daniel F. Miller, who was unable to be present on account of sickness:

*May it please the Court:*

On the thirtieth day of last May, Hon. J. M. Beck, who for twenty-four years of his life was a distinguished justice of this court, paid the debt of nature and passed, as I believe, to a home of happiness in the supernal world. We were friends, as intimate as brothers, for forty-five years of our lives. He was a native of Clermont county, Ohio, and was born April 21, 1823. His father was a farmer, and he was raised on a farm, and attended the common schools of the neighborhood until he was sixteen years of age, when he entered Hanover College, Indiana, from which he graduated in 1842. He then taught school several years in Kentucky, and next studied law with Judge Eggleston of Madison, Indiana, and was admitted to the bar of Indiana in 1846. Like many other young men anxious to come and grow up with the west, he came to Iowa

in 1847, and settled at Montrose, Iowa, where he commenced the practice of the law and continued in practice there for several years. I became acquainted with him while he was in Montrose, and formed for him a personal friendship almost the first time I met him. His location at Montrose was very unfortunate for law practice. Though he was learned and able as a lawyer, there was not enough law practice there to earn his board.

There were no railroads in the west in those days, and in November, 1849, I took a steamboat at Fort Madison, Iowa, on my way to Washington City, where I expected to remain during the winter, and where I did remain. On the way down the river the boat stopped an hour or two at Montrose, and there I saw Judge Beck and advised him to go to Fort Madison, and enter my law office, and do what law business he could on his own account. He went and took possession of my office during that winter, and when I returned in the spring, I had so much faith in his legal capacity and honesty of character that I tendered him a full partnership, which he accepted. We were in partnership almost eight years, and I found him to be the soul of friendship and honor in every transaction I had with him.

So well did the people of Fort Madison think of the young lawyer, who had newly come amongst them, that in two years from the time he came there, they elected him mayor of that city, though the majority of its voters were opposed to him in politics; and a couple of years afterward, as his sphere of acquaintance became more extended in the county, he was elected prosecuting attorney for the county, though the party in opposition to him in the county had three hundred majority. His personal worth and merit secured him a large number of votes from the opposite party, and the man whom he defeated was one of the leading men of that party.

Judge Beck's talents and fame as a lawyer and good citizen continued to grow, until at last it had become of state proportion, and in 1867, he was elected on the republican ticket to the bench of the Supreme Court of the state, and he was elected three times subsequently to the same position, thus holding the office of Justice of this court for twenty-four consecutive years, and it is a pleasure to all his friends to know that he performed the duties of that position with learning and ability, and he has left an unstained character upon the records of the country.

His uncle on his mother's side was the celebrated Thomas Morris, a United States senator, of Ohio, a man who a half century ago, when slavery controlled everything in the legislature and politics of the land, yet, as a senator of Congress, boldly stood forward and spoke in favor of the emancipation of the slave, and that freedom which is the birthright of all. It is true that speech destroyed his political influence in Ohio, and he was not re-elected, but his fame lives and is consecrated in the heart of every true American.

Judge Beck was prudent in his management of his business affairs, and left an estate valued at about \$75,000. In 1844 I had the pleasure of being present at his marriage with Miss Clara C. Reinhart, a most beautiful, accomplished and lovely young lady of Fort Madison, Iowa. They

were the parents of three children, of whom but two survive him. William J. R. Beck, and Miss Vallie E. Beck, both of whom worthily represent the merits and popularity of their parents. The Judge's wife died in 1885, preceding him some nine years.

"He has gone, he has fled, from the scene of his manhood  
From the many who loved him so well  
And the cord of regret in each bosom is started,  
As on his lov'd memory we dwell."

The day of his funeral the members of the bar of Lee county, Iowa, held a bar meeting in respect to his memory, and passed a series of resolutions in memorial of him, and one of the resolutions requested me to present them to this honorable court, and have them spread upon its record. Unfortunately for me I am sick in bed, and can not be present in court at the time appointed for presenting these resolutions. I have dictated the foregoing lines as a part of what I would have said had I been able to attend the court and expressed my views more fully in regard to the merits of my deceased friend, and my friend Captain Galland will read what I have dictated above, and with it I send a copy of the said bar resolutions, and move the court that they be spread upon its records.

### RESOLUTIONS.

**WHEREAS**, In the dispensation of Providence, our brother of the bar, the late Hon. Joseph M. Beck, of Fort Madison, has been removed from this plane of earth to a happier home, as we believe, in the life beyond, and

**WHEREAS**, He was a distinguished member of the bar of Lee county and state of Iowa, was twenty-four years a justice of the supreme court of the state, greatly honored by his judicial decisions, the force and strength of which have made a lasting impression upon the jurisprudence of the state of Iowa, and

**WHEREAS**, He was an exemplary citizen, a good father, a great jurist, greatly beloved for his moral and social qualities: Therefore, be it

*Resolved*, That in parting with our late friend and associate, Joseph M. Beck, from the scenes of earth's action, we feel a deep and sincere loss. That we honor his memory, and feel that the community has lost a citizen of great public worth, whose amiable qualities endeared him to his friends and associates, and his life and character will be long remembered as an example of the legitimate success that will always attend good habits, perseverance and industry.

*Resolved*, That we, the members of Bar of Lee county, Iowa, present to-day, respecting the memory of our deceased legal brother, will attend his funeral in a body.

*Resolved*, That Hon. D. F. Miller, Sr., is hereby appointed a committee to present a copy of these resolutions to the district court of Lee county, Iowa, and superior court at Keokuk, with request that they, be placed on the records of the respective courts, and that the same gentleman is appointed to present a copy of these resolutions to the supreme court of Iowa and the United States court at Keokuk, and ask that a copy of the foregoing resolutions be entered on the records of said courts.

*Resolved*, That a copy of the foregoing, preamble and resolutions, signed by the president and secretary of this meeting be presented to the family of the deceased, and that copies of the same be furnished to the papers in Lee county for publication.

J. M. CASEY, *Chairman*.  
J. J. WATSON, *Secretary*.

At the conclusion of the reading by Mr. Galland Hon. George G. Wright addressed the court as follows:

*May it please the Court:*

Judge Joseph M. Beck was identified—and very closely and usefully—for nearly forty-six years with the history of our state; more than half this time a member of this high court, his opinions appearing in forty-seven volumes of our reports; his judicial life continued for twenty-four years, a length of service exceeding that of any official of this state, and equaled by few in any other, old or new. A native of Ohio, of English-Welsh stock, on maternal and paternal sides of the very best, and in some respects of most distinguished families; educated in the schools and in the law office of the most eminent attorneys of Indiana; a school teacher in Kentucky; turning his face westward, he settled in Montrose in Lee county in 1847, removing thence to Fort Madison in 1850, where he lived until his death.

I made his acquaintance at the bar of the old first district as early as 1848, and on circuit and at the old capital as well as the new, met him at least every year until January 1, 1868, when he succeeded Ralph P. Lowe as a justice of this tribunal, having as his associates to the time of my retirement in September, 1870, Dillon, Cole, Williams, and myself. Aside from mayoralty of his city and prosecuting attorney of his county, I am not aware that he ever held or sought any other office. He was, however, always a leader in the affairs of his state, devotedly attached to the church and party of his choice, as also the great cause of education and everything tending to the upbuilding of our commonwealth. He was prominently connected with several large financial institutions, as also railroad and like enterprises, and I am glad to know that, beyond most of our profession, he was successful in his many business engagements.

Thus you have a brief epitome of the man of seventy years, the boy from the farm, the teacher, the young student from one of the best colleges and law offices of Indiana, the poor and friendless young attorney, who, in the early days made Iowa his home to struggle, with little means, as best as he could, for advancement, surrounded by the then perhaps strongest bar of the state, and who, by a life of industry, strict sobriety, fidelity to duty and almost unequalled devotion to a loved family, wife and two children, whose welfare and success was the constant dream of his life, overcame all obstacles, served with distinguished ability for almost a quarter of a century as one of the justices of this highest court of his adopted state, and leaves a name of which children, friends and Iowa are increasingly proud. Do you ask me my estimate, in brief, and I can not do more, of the man, my opinion of his leading characteristics? I answer.

*First:* He had as a lawyer, judge and citizen, the most positive and almost unchangeable convictions. So long as he thought he was right (and it was seldom otherwise when he had given time and consideration to the subject in hand), he was by many regarded as unreasonably obstinate. Certain it is that he seldom, if ever, changed. In matters not in-

volved, as he regarded, broad or great principles, he was not apt to be intolerant of the views of others; but when the very right or wrong was involved, and especially if it carried with it what he regarded the political or moral welfare of the public or of individuals, he was impatient of opposition, and brushed to one side as with a wave of his hand all and every argument against him. Some there are, I know, who speak of such characteristics as the result of strong prejudices or preformed opinions regardless of the truth or justice of the particular case or question in hand. This is often deprecated and perhaps not without warrant. Those thus speaking, however, are quite apt to deny the existence of prejudice in their own minds, insisting that they can come to a question or solution of a legal or other problem entirely divested of any prejudices or preconceived notions.

I confess I am always somewhat inclined to question such assumed superior mental equilibrium, for observation, if not experience, teaches me that of all things we are the most unsafe judges of the strength of our own prejudices, and whenever we for ourselves undertake to weigh and decide upon their weight, their presence or absence, we become at the same time, client, attorney, court and jury. I distrust all such persons; not their integrity, but want of ability to do what they say or propose. Nor do I condemn, in the judge, even, preformed notions on questions of principle or, for illustration, the strongest feeling to uphold the right and substantive law at the sacrifice of technicalities so called, which I know are often the very shield and not the foil of individual rights. We all have preconceived and firmly fixed notions. Talk as we may, they color or stain, it may be ever so unconsciously, our conclusions or arguments, but though unconsciously, they color them all the same. Our friend had these preformed opinions or convictions. As in the case of other good men the country over, they were a part of himself. He believed that men ought to live honestly and soberly, to so work as to insure integrity, morality, temperance and all that tends to make us better citizens of a country so blessed. And, so believing, he was naturally and logically apt to solve every issue in favor of all that led in this direction, and against everything tending otherwise. In all such matters his mind was a very Gibraltar of convictions—a constant menace to evil doing and all violators of the law. And hence it was not strange (and I speak of it as his friend and not at all to his disparagement) as illustrating this trait, this tendency to follow his convictions on particular subjects—I say it is not strange, with his abhorrence of the liquor traffic, in any and all its forms, that as we can well suppose, his fingers would tingle with honest pleasure when he could, with fair justice, punish any and all who indulged in such traffic or hold them to all legal penalties, however stringent or heavy. But all this aside, he was an able judge, very industrious and faithful to the highest trusts, laboring with a fidelity seldom equaled, to know and declare the law, utterly regardless of who might be helped or injured, pleased or offended. The judicial arm of the state and nation, always so panoplied, and harm will seldom if ever come to the great republic.

*Second:* As a lawyer, he was painstaking, diligent and usually tenacious of his own views and the rights of his client. His cause, as a rule,

was always right, and seldom, if ever, did he surrender his convictions even after the adverse judgment of the highest courts of the land. He had enthusiastic devotion to his cause, and put on so completely what may be styled the 'partisan harness,' that he was among the most zealous advocates, fighting every inch of ground, and never leaving the battle field until overwhelmingly routed, and then only to form, if possible, new lines of attack or defense, or, if not to nurse his wrath, at least condole himself that he had made the best fight possible. He was fearless in all he undertook; safe and discreet in counsel; honorable and gentlemanly at the trial table, an admitted power in every stage of a prosecution or defense.

*Third:* He was an honest, conscientious, clean man, having the very fewest vices; and, whether in church, at the head of his long-loved Sunday school, working diligently in the affairs of the greatest moment to his home, state or county; at the bar or on the bench; in social or public life; in his family or on the platform, he fought as he believed—for the supremacy of truth, justice and right, and when he was so suddenly called home, the state lost a Christian jurist and citizen; this bench, one for so many years the peer of any, old or new; his church among its most conscientious and consistent members; his loving daughter and worthy son, a father whom they justly worshipped; the bar, one of its brightest ornaments and friends, the state over, one whom they came, and justly so, to regard as preeminently worthy, and as the years rolled on, more and more entitled to their admiration, respect and esteem.

May it please the court; one by one they pass away. Lee county, the home of so many of the greatest and best of our bar, how sadly the ranks have been depleted! Where are Alfred Rich, Phillip Viele, Hugh T. Reed, Edward Johnston, Samuel F. Miller, John W. Rankin, Thomas W. Claggett, George W. McCrary, Louis R. Reeves. Henry Eno, Ralph P. Lowe, Samuel R. Curtis, James B. Howell, James H. Cowles, Charles Mason, William J. Cochran, James M. Love, Samuel Boyles, Geo. C. Dixon, W. A. Thurston, John Van Valkenberg, W. W. Belknap, Webster Ballinger (and there may be others equally worthy of mention) a galaxy almost unequalled in all the land! How great, strong and effective for good the impress of their lives in the affairs of state and nation! All gone, and, following them, our friend. Few, if any counties, can claim a bar so strong, able or more honorable, possessed of more elements calculated to elevate the profession. And of them all, your and my late colleague may be admitted with justice to stand in the very front ranks. We all mourn him as a friend and respect his memory for his many excellencies and virtues.

On behalf of the court, Mr. Justice Robinson made the following remarks.

Judge Beck's connection with the judicial system of this state commenced nearly half a century ago, when he began the practice of the law in Lee county. Among his professional contemporaries of that time

were men of rare power, whose names have become inseparably connected with the early judicial history of the state. Most of them passed away so long ago that their names and work have place in the memories only of their few surviving associates, or are shown in the more enduring records of this court. Of the men now gone who had attained prominence in their profession when Judge Beck entered upon his life work were, Starr, Joseph Williams, Rorer, Grant, Knopp, J. C. Hall, H. T. Reid, Mason, Renken, Samuels and Woodward. Twenty years spent in the active practice of his profession in contact with such men, and with others of equal ability and experience, of necessity helped to develop the character of Judge Beck, and to fit him for the arduous duties he was required to perform as a judge of this court.

When he commenced his work as a lawyer, the procedure of our courts was changing from that of the common law to the less complex, and, perhaps, less certain, practice under the Code. Only one of the great land grants which were designed to aid in the development of the material resources of the state—that for the improvement of the Des Moines river—had then been made. The many questions which grew out of that grant, the swamp land grant of 1850, and those afterward made for railway purposes, and upon which the titles to a large portion of the state were to depend, were undetermined and unknown. The revenue system was imperfect; the law in regard to the transfer of property, domestic relations, master and servant, common carriers, and for the protection of the life, health and property of the citizens, was to be settled. Many grave constitutional questions, among which were those involving the power of the people to tax and govern themselves, were to be determined, and methods of procedure in the courts were to be changed, and new ones established. With many of these questions, Judge Beck had, of necessity and by inclination, become familiar. When he took his place as a member of this court, in January, 1868, he brought with him an extensive knowledge of the law, acquired by a diligent study of its principles, and by their application in actual practice.

His first appearance in this court as an attorney of record was in the case of *Cuddeback v. Parles*, determined in May, 1849, and reported in 2 G. Greene, 148. The judges of the court at that time were Joseph Williams, John F. Kinney and George Greene. His first opinion as a member of the court, in *Lippincott v. Allander*, was filed in January, 1868, and is reported in 23 Iowa, 536. During the twenty-four years he was a judge of the court, he prepared opinions which are found in sixty-two volumes of its reports. His work as an attorney and judge of the court extended through forty-five years, and is shown in the eighty-eight volumes of its reports which cover that period. He was a man of much more than ordinary mental power, and he impressed his strong individuality upon those about him, and upon the work of the court. It may be said that he was not fond of the details of judicial work, and that he did not always give to cases involving intricate questions that patient and painstaking investigation which was essential to a full understanding of material facts, but in determining important questions, and in applying legal principles to

new conditions, he displayed a breadth of comprehension, an originality and power of reasoning, and an accuracy of conclusions which are surpassed by few in like stations.

He was a man of strong predilections, and inclined naturally to the side of the weak as against the strong. Sometimes his sympathies led him to the limits of a sound legal discretion, but such cases were exceptional. Considered as a whole, his work as a jurist manifested a clear analysis of facts, sound reasoning, and a logical application of the principles of the law, an earnest desire to reach just results, a disregard of useless forms, and a vigorous effort to impart to the administration of justice something of the progressive spirit of his time.

He helped to lay the foundation for and to build thereon the superstructure of our jurisprudence, and to make it worthy of a free and enlightened people. He was not only learned in the law, but, with the advantage of a liberal education, he was an earnest student of general literature, and a close and intelligent observer of current events. As a conversationalist, he had few superiors, and was always entertaining and instructive.

As a trustee of the state library, he labored with tireless zeal to enrich it with the best works obtainable, and to increase its usefulness in all ways possible. None have surpassed him in the interest shown in that work.

For him the briefs are laid aside, the arguments are ended, the books are forever closed. He has gone from among us into that voiceless realm whence none return. But posterity will hold him as a master builder of the state, and will revere his memory as one of its benefactors.

At the conclusion of Justice Robinson's remarks, the chief justice announced that it was ordered that the resolutions presented by Mr. Miller be spread upon the records.

# JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS

---

GIFFORD S. ROBINSON, SIOUX CITY, *Chief Justice.*

CHARLES T. GRANGER, WAUKON.\*

JOSIAH GIVEN, DES MOINES.

JAMES H. ROTHROCK, CEDAR RAPIDS.

L. G. KINNE, TOLEDO.

---

## OFFICERS OF THE COURT.

JOHN Y. STONE, GLENWOOD, *Attorney General.*

GILBERT B. PRAY, WEBSTER CITY, *Clerk.*

NATHANIEL B. RAYMOND, DES MOINES, *Reporter.*

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\* The term of Chief Justice Robinson expired December 31, 1894, and, thereupon, Mr. Justice Granger became Chief Justice by order of rotation.

# JUDGES OF THE COURTS

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

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## DISTRICT COURTS.

*First District*—J. M. CASEY, Ft. Madison; JAMES D. SMYTHE, Burlington.

*Second District*—M. A. ROBERTS, Ottumwa; T. M. FEE; Centerville;  
F. W. EICHELBERGER, Bloomfield; ROBERT SLOAN, Keosauqua.

*Third District*—H. M. TOWNER, Corning; W. H. TEDFORD, Corydon.

*Fourth District*—SCOTT M. LADD, Sheldon; GEO. W. WAKEFIELD, Sioux  
City; F. R. GAYNOR, Le Mars; JOHN F. OLIVER, Onawa.

*Fifth District*—J. H. HENDERSON, Indianola; A. W. WILKINSON, Win-  
terset; J. H. APPLGATE, Guthrie Center.

*Sixth District*—DAVID RYAN Newton; A. R. DEWEY, Washington; BEN  
McCoy, Oskaloosa.

*Seventh District*—C. M. WATERMAN, Davenport; W. F. BRANNAN,  
Muscatine; P. B. WOLFE, Clinton; A. J. HOUSE, Maquoketa.

*Eighth District*—MARTIN J. WADE, Iowa City.

*Ninth District*—W. F. CONRAD, CALVIN P. HOLMES, WM. A. SPURRIER,  
and THOMAS F. STEVENSON, Des Moines.

*Tenth District*—J. J. TOLLETON, Cedar Falls; A. S. BLAIR, Manchester.

*Eleventh District*—D. R. HINDMAN, Boone; S. M. WEAVER, Iowa Falls;  
BENJAMIN P. BIRDSALL, Clarion.

*Twelfth District*—JOHN C. SHERWIN, Mason City; PORTER W. BURR,  
Charles City.

*Thirteenth District*—L. E. FELLOWS, Lansing; A. N. HOBSON, West  
Union.

*Fourteenth District*—LOT THOMAS, Storm Lake; WM. B. QUARTON, Algona.

*Fifteenth District*—A. B. THORNELL, Sidney; WALTER I. SMITH, Council  
Bluffs; N. W. MACY, Harlan; W. R. GREEN, Audubon.

*Sixteenth District*—S. M. ELWOOD, Sac City; Z. A. CHURCH, Jefferson.

*Seventeenth District*—GEORGE W. BURNHAM, Vinton.

*Eighteenth District*—WILLIAM P. WOLF, Tipton; WILLIAM G. THOMPSON,  
Marion.

*Nineteenth District*—FRED. O'DONNELL, Dubuque; JAMES L. HUSTED,  
Dubuque.

The terms of all District Judges commenced January 1, 1895, and  
will expire December 31, 1897, except Porter W. Burr, of the Twelfth,  
Lot Thomas, of the Fourteenth, and N. W. Macy, of the Fifteenth Dis-  
tricts, whose terms commenced January 1, 1893, and will expire Decem-  
ber 31, 1896.

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## SUPERIOR COURTS.

*Cedar Rapids*—THOMAS M. GIBERSON.

*Council Bluffs*—J. E. F. MCGEE.

*Keokuk*—HENRY BANK, JR.

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# STATUTES OF THE STATE OF IOWA

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DETERMINED BY THE  
SUPREME COURT  
OF  
THE STATE OF IOWA,  
AT

DES MOINES, OCTOBER TERM, A. D. 1893.

IN THE FORTY-SEVENTH YEAR OF THE STATE.

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108	741

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THE STATE OF IOWA, Appellee, v. EDWIN JOHNSON,  
Appellant.

1. **Bastardy:** COMPLAINT: MOTION TO QUASH: WAIVER OF ERRORS. The rules applicable to ordinary actions prevail in bastardy proceedings. Accordingly, where the defendant in such a proceeding moved to quash the complaint, and the motion was overruled, he waived his right to object to such ruling by pleading not guilty, and going to trial on such plea.
2. ———: EVIDENCE: SEXUAL RELATIONS WITH OTHER MEN. In a bastardy proceeding, evidence that the defendant had sexual intercourse with men other than the defendant, but not at the time the child was begotten, is immaterial to the main issue, and is not admissible for the purpose of impeaching the complaint, when no foundation has been laid.

3. ———: RECALLING WITNESS: FACTS OVERLOOKED. It is no abuse of the court's discretion to allow the state in such proceeding to recall a witness, after the defendant has rested, to prove facts which might have been established on his first examination, but which were then overlooked.
4. ———: QUESTION IN ISSUE: EVIDENCE TO SUPPORT VERDICT. Where there is evidence to support a verdict of guilty in such proceeding, it can not be set aside upon evidence that the prosecutrix was a woman of loose habits, and that, upon the night when the child was begotten, she was in questionable relations with a man other than the defendant, but with whom, by her uncontradicted testimony, she did not have sexual intercourse.

*Appeal from Winneshiek District Court.*—HON. W. A. HOYT, Judge.

WEDNESDAY, OCTOBER 4, 1893.

PROCEEDINGS to charge the defendant with the maintenance of a bastard child. There was a trial by jury, and a judgment against the defendant. He appeals.—*Affirmed.*

*E. R. Acres* for appellant.

No appearance for appellee.

ROBINSON, C. J.—I. The complaint is made by Sarah Christenson, and states that she is, and has been for more than fifteen years, a resident of Winneshiek county, in this state; that she is pregnant with a child, which, if born alive, will be a bastard, and, if living, liable to become a charge upon the county; that the defendant is the father of the child, and has so far failed to provide means for her support. The defendant filed a motion to quash the complaint, which was overruled, and he now insists that the ruling was erroneous. Whether it was or not we are not required to determine. Although this is a proceeding conducted in the name of the state, on complaint filed, the issue

1. BASTARDY:  
complaint:  
motion to  
quash: waiv-  
er of errors.

in which is guilty or not guilty, yet it is tried as an ordinary action to establish a civil liability, and when not otherwise provided, the rules applicable to such actions govern. Code, section 4720; *McAndrew v. Madison Co.*, 67 Iowa, 54; *State v. Severson*, 78 Iowa, 653. After the motion was overruled, the defendant pleaded not guilty, and went to trial on the merits, thereby waiving his right to object further to the ruling.

II. The prosecutrix is unmarried, and at the time of the trial was the mother of a child. She testified that she had sexual intercourse with the defendant on the night of August 10, 1890, at which time the child was begotten, and that the defendant is its father. Helge Gunderson, who testified as a witness for the defendant was asked the following question: "How many times have you had sexual intercourse with Sarah?" An objection to the question was sustained, and of that ruling the defendant complains. We think it was correct. The question was not proper for the purpose of impeachment, for the reason that it was too general in its scope, and no foundation therefor had been laid by questions asked of the prosecutrix. It was immaterial for the reason that, if it were true that she had been guilty of sexual intercourse with the witness at different times, that fact would not constitute a defense to this action. *State v. Lavin*, 80 Iowa, 562. It is not claimed that she had sexual intercourse with him at the time the child was conceived.

III. A witness named Folsoss, who had testified for the plaintiff, was recalled after the defendant rested, and permitted, over the objection of the defendant, to testify to facts which might have been proven by the plaintiff when offering its evidence in chief. The defendant insists that his objection should have been sustained. It was proper for the state to recall a witness to testify to facts

2. —: evidence:  
sexual rela-  
tions with  
other men.

3. —: recalling  
witness: facts  
overlooked.

which had been overlooked on his first examination, and that appears to be what was done in this case. We can not say that there was any abuse by the court of its discretion in permitting the witness to be recalled and examined further. Had the defendant wished an opportunity to dispute the testimony given by the witness when recalled, he would have been entitled to it, but he did not ask for it, and has no sufficient reason to complain of what was done.

IV. The chief ground upon which the defendant relies for a reversal of the judgment of the district court is that the verdict is not supported by the evidence. It is shown that the prosecuting witness sometimes went about the neighborhood of her home dressed in boy's clothes; that she treated young men to liquor; that in the year 1890 she frequently slept with different men, several of whom are named; that during the first part of the night of August 10, 1890, she occupied her bed with one Tom Myron, and during the latter part of the night she occupied it with the defendant. She testifies that she did not have sexual intercourse with any of those men, excepting the defendant; that the others did not remove their clothing, and were not in the bed, but on it; that what they did was according to a usage of young people of her nationality, called in the record "bundling," and was not for the purpose of, and did not lead to, sexual intercourse. Her testimony in regard to what occurred the night of August 10, is not contradicted in any material respect by any witness. It must be admitted that her claim that she had never had sexual intercourse with any one, excepting defendant, in view of her admissions, is at least improbable, for obvious reasons, but we can not say that it is not supported by the evidence. She testified in a frank, straightforward manner, without any apparent attempt at evasion, and it was the province of the jury, and

4. —: question  
in issue: evi-  
dence to sup-  
port verdict.

peculiarly within their power, to estimate her credibility and weigh her testimony. The fact that her conduct with others has been unchaste and indecent is not a defense for the defendant. The material question to be determined is not "what is the character of the prosecutrix?" but "is defendant the father of her child?" The jury found that he is, and the district court, which saw the witnesses and heard the evidence, was of the opinion that the verdict had sufficient support in the evidence. We are of the opinion that it was so far authorized by the evidence that we should not disturb it.

V. The appellant complains of the overruling of his motion for a new trial. The motion was based in part upon newly-discovered evidence, upon misconduct of the jury, and upon the absence of a witness who had been subpoenaed, but who did not attend the trial. Little is said in argument on this branch of the case, and we need only say that we think the ruling was correct.

We discover no ground for reversing the judgment of the district court. It is, therefore, **AFFIRMED**.

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**THE STATE OF IOWA, Appellee, v. GEORGE MILHOLLAND, Appellant.**

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**Manslaughter by Minor:** CAPACITY TO COMMIT CRIME: INSTRUCTION TO JURY. The defendant was found guilty of manslaughter upon evidence which showed that, when he was only thirteen years of age, he willfully, but without anger or malice, threw a playmate, a boy ten years of age, into the water, so that he was drowned. The court, on its own motion, gave the following instruction: "In determining the guilt or innocence of the defendant, you may consider his age, and all facts and circumstances which are in evidence or arise from the evidence." No other instruction was asked or given with reference to the age of the defendant. *Held*, that the verdict could not be set aside on appeal on the ground that the instruction given was insufficient to present to the jury the question whether or not the defendant, at his age, possessed sufficient capacity to render him criminally liable for the homicide.

*Appeal from Dubuque District Court.*—HON. FRED O'DONNELL, Judge.

WEDNESDAY, OCTOBER 4, 1893.

THE defendant was indicted, tried, and convicted of the crime of manslaughter. The substance of the charge is that on June 21, 1892, in Dubuque county, Iowa, the defendant did willfully, feloniously, and of malice aforethought, by force and violence, and against the will of Francis Mulqueeny, throw said Mulqueeny into a slough of water, by reason of which said Mulqueeny was drowned. The defendant's motion in arrest of judgment was overruled, and judgment entered that he be committed to the State Industrial School at Eldora for the period of four years. The defendant appeals.—*Affirmed.*

*W. J. Cantillon*, for appellant.

*John Y. Stone*, Attorney General, and *M. C. Matthews*, for the State.

GIVEN, J.—The evidence shows without conflict that on the day named the defendant, then over thirteen years of age, the deceased, aged ten, and another ten year old boy named Rudolph, went to bathe in a slough or pond of water. They went upon a lumber raft, where the defendant and the deceased undressed, and went into the water, the deceased holding to the raft, and the defendant swimming around. After the defendant had been in the water he returned to the raft, where the deceased was, and seized and threw him into the water, so that he sank, and was drowned. When the defendant caught hold of the deceased to throw him in the water, the deceased resisted by catching hold of some shingles, and called to let go, and not to throw him in. "Milholland grabbed his hands loose,

and put one hand round his back, the other hand round his legs, and threw him in." When the defendant saw that deceased did not rise to the surface he said "Poor little fellow; poor little boy; poor little Frankie;" and called to other boys near by, to know if they could dive. There is no evidence that the defendant was actuated by anger or ill will. The boys were friends, and acted in the most friendly way towards each other up to the moment that the defendant seized the deceased to throw him in the water. The only conflict in the evidence is this: The boy Rudolph testifies that immediately after this happened the defendant said he would give him five dollars, would treat every time he had money, and would let no one in the hollow hit him if he would not tell. The defendant, in his testimony, denies that he said these things on the raft, but says it was about a month after that he offered him five dollars. The defendant testifies that on the way to the raft the deceased told him that he could swim. Rudolph states that he said he could swim a little. Mrs. Milholland, mother of the defendant, testifies that he would be fourteen years old on December 12, 1892. These are in substance the facts upon which the case was submitted to the jury, and we state them thus fully, that the single question presented on this appeal may be better understood.

I. No instructions were asked by either party. The court, upon its own motion, gave the following instruction, with others: "In determining the guilt or innocence of the defendant, you may consider his age, and all facts and circumstances which are in evidence or arise from the evidence." No other instruction was asked or given with reference to the age of the defendant. The appellant does not complain of this instruction so far as it goes. His contention is that under the law a person under fourteen years of age can not be convicted of a crime, unless the state shows that

he possessed sufficient capacity to understand the nature of a crime; that it is the duty of the court to instruct fully on the law of the case, and that the court erred in not giving the law fully to the jury. Counsel for the appellee, without questioning the appellant's statement of the law, contend that, as applied to the facts, the instruction was sufficiently full and explicit, and that the facts fully show that the defendant had sufficient capacity to render him criminally liable for the act charged. While the instruction might properly have been more full and explicit, yet, in view of the emphasis given to the matter of the defendant's age, it must have been understood as presenting the question of his accountability. Discussion is unnecessary to show that the jury were fully warranted in finding that the defendant had sufficient capacity to be held criminally liable for his acts in causing the death of Francis Mulqueeney.

The judgment of the district court is **AFFIRMED**.

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**U. C. BLAKE, Administrator, Appellee, v. BURLINGTON,  
CEDAR RAPIDS & NORTHERN RAILWAY COM-  
PANY, Appellant.**

**Railroads:** INJURY TO PASSENGERS RIDING IN SHOW CAR: CONTRIBUTORY NEGLIGENCE. The plaintiff's intestate was an employee of a traveling theatrical company, and it was his duty, when the company was being transported from place to place, to ride in the show car, owned by the company, in order to care for the company's property carried therein. This show car, while being transported by the defendant, was placed next to the engine in one of its passenger trains, and the plaintiff's intestate, while riding therein, was killed by a collision of his train with another. In an action for damages the evidence showed that the deceased had been riding in a passenger coach, but, some time before the collision, went forward to the show car; that the show car was a strong, well built car, fitted up on purpose for the accommodation of the employees whose duty it was to remain there day and night, and care for the scenery and other property of the com-

pany, and it did not appear that the defendant's employees made any objection to the deceased riding in said car. *Held*, that it was not, as matter of law, contributory negligence for the deceased to ride in the show car, under the circumstances, but that the question as to his contributory negligence was properly submitted to the jury, and that a verdict for the plaintiff on that issue could not be disturbed on appeal.

*Appeal from Black Hawk District Court.*—HON. JOHN J. NEY, Judge.

WEDNESDAY, OCTOBER 4, 1893.

THIS is an action to recover damages for the death of one Thomas Scott, the plaintiff's intestate, who, it is alleged, was killed by reason of the defendant's negligence while said Scott was being carried as a passenger on one of the defendant's railroad trains. There was a trial by jury, and verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed*.

*O. C. Miller and S. K. Tracy*, for appellant.

*Boies, Couch & Boies*, for appellee.

ROTHROCK, J.—It is conceded that Thomas Scott was killed while traveling as a passenger on one of the defendant's trains. The casualty was caused by a collision with another train. There is no controversy about the liability of the defendant, except that arising upon the alleged contributory negligence of the deceased. The question in controversy is stated in the appellant's argument in the following language: "Decedent, while a passenger on defendant's train, was killed by a collision; and, therefore, at the threshold of the argument appellant's negligence must be admitted, and it should be held liable to the plaintiff for the accident, unless decedent's contributory negligence exonerates the company from liability." This is the only question in controversy on this appeal. And it may be said that there is

no real conflict in the evidence, and the question therefore resolves itself into the simple inquiry whether the jury were warranted in finding from the evidence that the plaintiff established the fact that the deceased was free from negligence which contributed to his death.

The case has once before been in this court upon an appeal by the defendant. It was reversed on the ground that the evidence showed that the deceased was guilty of contributory negligence by riding in an unsafe place on the train. See 78 Iowa, 57. It appears from the facts recited in the opinion on that appeal that the deceased was a member of a traveling theatrical troupe known as the "Lights of London." The company owned a car in which to transport its show property by railroad. There were three bunks or berths for persons to sleep in at one end of the car. This car was hauled from Albert Lea, Minnesota, to Cedar Rapids, in this state, by the defendant. It was placed in a passenger train next to the engine. The train was due at Cedar Rapids at about 2:30 in the morning. Before reaching Cedar Rapids it collided with a north-bound passenger train on the defendant's road. The deceased was in the show car when the collision occurred, and was killed by reason of the collision. The evidence upon the first trial showed that the show car was not adapted to the transportation of passengers, and it was found as a fact by this court that it was "of unusual length, high, narrow and flimsily built," and that it was negligent for Scott to ride there, unless he "was there in some manner by the consent of the railroad company." It is further said in the opinion that no one testified that it was the duty of Scott to ride in this car to care for the property. It was further found as a fact that Scott and three other showmen, after riding in one of the passenger coaches for a time, went forward to the show car, and that the conductor went into that car, and took up their tickets, and said to the four men

"that they must not ride there; that it was not a safe place to ride, and it was against the rules of the company."

The evidence upon the last trial was not the same as on the first trial. It was materially different. On the last trial there was evidence which showed that the car in which deceased was killed was a strong, well-built car, and that in the collision this car telescoped the baggage car which was attached to it in the rear. There was no evidence on the last trial that the deceased was forbidden to ride in the show car, and no evidence that the conductor, when taking up the tickets, told deceased or any other person in his presence or elsewhere that they must not ride in the show car, or that he gave any order or direction on that subject. And there was evidence on the last trial that Scott's duty to his employer required that he should ride in that car, to care for the show property, and that a stove and lamps and berths were in the car for the comfort of the employees whose duty required their presence in the car night and day in the handling of the scenery and properties. We have stated enough of the evidence on the last trial to show that it differed in many material respects from that discussed by this court upon the former appeal. There is no question in our minds that upon the last trial the question whether the deceased was chargeable with contributory negligence was a question for the jury to determine, and that its finding ought to be conclusive. Why the evidence was so radically different on the two trials is not a question for our consideration.

It is contended by counsel for appellant that the plaintiff ought not to recover, because his intestate voluntarily left the passenger coach for his own pleasure, and knowingly assumed a more hazardous place on the train, and by that act directly contributed to his death. The facts of this case do not, in our opinion,

bring it within the rule of the cases cited by counsel. In *R'y Co. v. Jones*, 95 U. S. 439, the injured party was riding on the pilot of the locomotive when he was injured. In the other cases the passenger was riding upon platforms of cars, or riding on the foot board in front of an engine. In *Jacobus v. R'y Co.*, 20 Minn. 125, it was held that where a passenger was riding in a baggage car he might recover for an injury sustained while in that position if he was there with the knowledge of the conductor of the train, and without any attempt of the conductor to enforce a rule requiring passengers not to ride in baggage cars. In *Dunn v. R'y Co.*, 58 Me. 187, the plaintiff was riding in the "saloon car" of a freight train, where the conductor permitted him to remain, and collected his fare. It was held that recovery might be had for injury sustained by reason of the company's negligence. See, also, *Creed v. R'y Co.*, 86 Pa. St. 139, where recovery was had in a case where, with the knowledge and acquiescence of the conductor, a passenger was permitted to ride in a caboose, which was for the exclusive use of the train hands.

It is not necessary to further consider the case. Under the evidence the jury might well find that the deceased was in the direct line of his duty in riding in the show car, and that he was allowed to remain there without any effort on the part of the conductor to induce him to return to a passenger coach; and not only this, but, as the evidence is now presented, it can not be said as matter of law that riding in the show car was attended with any known hazard.

The judgment of the district court is **AFFIRMED**.

BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY  
COMPANY, Appellant, v. PETER A. DEY *et al.*,  
Railroad Commissioner, Appellees.

**Former Adjudication:** APPLICATION OF RULE TO SECOND APPEAL.

This action was originally begun to enjoin the railroad commissioners from establishing and promulgating joint rates for the plaintiff, in connection with other railroad companies, for the shipment of cars over such roads, on the ground that the statutes authorizing the commissioners to establish and promulgate such joint rates were in conflict with various provisions of the constitution of the United States, and that of the state of Iowa. Upon a motion to dissolve the temporary injunction issued in the case, the legal effect of which was the same as a demurrer to the petition, the constitutionality of the statutes involved was fully considered, and affirmed on a former appeal to this court. The cause having been remanded, the plaintiff amended its petition by averring that, since the former hearing, the commissioners had fixed such joint rates, ordered that they take effect on a certain day, and that such order was without authority of law, and in excess of the powers of the commission, and that the statutes authorizing it were void, "and in conflict with various provisions of the constitution of the United States, and that of the state of Iowa, for the reasons heretofore fully set forth," and each and all of the reasons so referred to were found in the petition passed upon on the first appeal. *Held*, upon appeal from an order sustaining a demurrer to the petition as thus amended, that the demurrer raised no question not raised and decided on the former appeal, and, particularly, that it did not raise any question as to the reasonableness of the rates fixed by the commissioners, and that, therefore, the questions raised could not be reconsidered, the rule being well settled in this state that when a question involved in a cause has once been adjudicated in this court, it becomes the law of that case, as between the parties, and will not be reconsidered upon a subsequent appeal of the same cause.

*Appeal from Johnson District Court.*—HON. S. H. FAIRALL, Judge.

THURSDAY, OCTOBER 5, 1893.

ACTION in equity to restrain and enjoin the defendants, as railroad commissioners of this state, from enforcing a certain order, made by them, establishing

joint rates of charges for the transportation of freight and cars over the road of the plaintiff and connecting lines of road; also to enjoin and restrain said commissioners from enforcing any other order compelling the plaintiff to enter into joint through rates of freight charges with other railroad companies.—*Affirmed*.

*S. K. Tracy* and *A. E. Swisher*, for appellant.

*John Y. Stone*, Attorney General, for appellees.

KINNE, J.—I. This is the second appeal in this case. The former appeal was from a ruling of the district court refusing to dissolve an injunction, and is reported in 82 Iowa, 312. The decision of the court below was reversed, and the cause remanded. The defendants filed a demurrer to the petition as amended after reversal, and the court entered judgment sustaining said demurrer, from which ruling the plaintiff appeals. As the demurrer challenges the sufficiency of the petition to constitute a cause of action, it becomes necessary to state the substance of the pleading thus assailed.

The plaintiff, after averring its corporate capacity, states that the defendants are the board of railroad commissioners of this state; that by chapter 28, Acts of the Twenty-second General Assembly, said board is given authority to fix, establish and publish reasonable maximum rates of charges for the transportation of freight upon railroads within this state; that a schedule of rates has been adopted by said board for the petitioner, which was accepted and adopted by it as reasonable and just; that said chapter 28, Acts of the Twenty-second General Assembly provides that all railway companies doing business in this state, upon the demand of any person, shall establish joint rates for the transportation of freight between points on their respective lines, and shall receive and transport

freight and cars over such routes as the shipper shall direct; also that, when the rates for transportation charges are fixed by the board of railroad commissioners, such rates shall, in all suits brought against any railroad company wherein are in any way involved the charges of such railroad for the transportation of freight, be deemed and taken in all courts of this state as *prima facie* evidence that the rate thus fixed is a reasonable and just charge for the transportation of freight and cars upon such roads, and any greater rate charged shall be deemed extortion. Said chapter further provides that for violating the charges or rates thus fixed the penalty is to forfeit and pay to the state of Iowa not less than one thousand dollars nor more than five thousand dollars for the first offense, and not less than five thousand dollars nor more than ten thousand dollars for any subsequent offense, to be recovered in a civil action by ordinary proceedings in the name of the state; that demands have been made upon the petitioner, under the law, that it shall make joint rates with other railroads, as in the act contemplated, and the petitioner refuses so to do; that under the act of the legislature known as the "Joint-Rate Act" it becomes the duty of the commissioners, upon such refusal, and upon the application of any person, to establish joint rates between the defendant and connecting roads; that said board has been so requested to establish joint rates between the petitioner and other railroads, and is about so to do, and to promulgate the same, and said rates will be established and promulgated unless restrained by order of this court, thereby subjecting the petitioner to the penalties heretofore referred to in the event of noncompliance with the joint rates so established and promulgated; that the joint-rate bill, a copy of which is attached hereto, is unconstitutional and void, said commissioners having no authority or right to fix a joint rate, or to promul-

gate the same; that said act deprives the petitioner of rights guaranteed to it by section 9, article 1, of the constitution of Iowa, in that it deprives the petitioner of its property, and the right to contract, and deprives it of its liberty, without due process of law, and prevents it acquiring, possessing, controlling, and protecting its property, as guaranteed by section 1, article 1, of the constitution of Iowa, and by like provisions of the constitution of the United States. If the defendants are permitted to establish and promulgate such joint rates, although the same will be void, yet thereunder the petitioner will be subjected to a multiplicity of suits to recover the penalties referred to, and will be otherwise harrassed by vexatious litigation. The petitioner is without remedy at law, and prays that a temporary writ of injunction issue restraining the defendants, and each of them, as such board, from establishing and promulgating joint rates with it in connection with other railroads for the shipment of freight and cars over such different railroads, and that on final hearing the injunction may be made perpetual.

July 7, 1890, the petitioner amended its bill averring that the joint-rate act was unconstitutional and void, because it denied the right of trial by jury, and denied due process of law in the protection and preservation of its property as guaranteed by section 9, article 1, of the constitution of Iowa; that its property or its use thereof, is taken without its consent, and without just compensation, for private and public purposes; that its right of appeal is so tampered with as to make it ineffectual; that in the enforcement of any order promulgated by said commissioners all distinctions between law and equitable actions are abolished by said acts, in violation of section 6, article 5, of the constitution of Iowa, that said acts are in violation of section 8, article 1, of the constitution of the United States, in that they are a regulation of commerce among the several states;

that said acts violate section 17, article 1, of the constitution of Iowa by imposing excessive fines and unusual punishment; that said acts are void because they fail to describe or define the offenses for which the penalties are imposed, and impose penalties by way of attorney's fees; that said acts are in violation of the fourteenth amendment to the constitution of the United States, in that they abridge the privileges or immunities of the petitioner as a citizen, and deny it the equal protection of the laws, deprive it of its property, and the use thereof, without just compensation or due process of law; that by said acts the petitioner is denied the liberty of contracting with reference to its business, is compelled to enter into involuntary, unreasonable, and unprofitable contracts with other railroad companies at the instance of third persons, compelling the operation of the road at a loss; that no notice is given the petitioner of the time and place when and where said joint rates will be fixed, or to show the unreasonableness of the same; that the rates so fixed are final and absolute.

The following exhibit was attached to and made a part of the petition:

**"EXHIBIT A.**

"An act to amend chapter 28 of the Acts of the Twenty-second General Assembly, giving authority for the making of rates for the transportation of freight and cars over two or more lines of railroad within this state, and enlarging the powers and further defining the duties of the board of railroad commissioners.

*"Be it enacted by the general assembly of the state of Iowa:*

"Section 1. That chapter 28 of the Acts of the Twenty-second General Assembly be and the same hereby is amended as follows: That said chapter 28 of the Acts of the Twenty-second General Assembly shall not be con-

strued to prohibit the making of rates by two or more railroad companies for the transportation of property over two or more of their respective lines of railroad within this state, and a less charge by each of said railroad companies for its portion of such joint shipment than it charges for a shipment for the same distance wholly over its own line within the state, shall not be considered a violation of said chapter 28 of the Acts of the Twenty-second General Assembly, and shall not render said railroad company liable to any of the penalties of said act, but the provision of this section shall not be construed to permit railway companies, establishing joint rates, to make by such joint rates any unjust discrimination between the different shipping points or stations upon their respective lines between which joint rates are established, and any such unjust discrimination shall be punished in the manner and by the penalties provided by chapter 28 of the Acts of the Twenty-second General Assembly.

“Sec. 2. All railway companies doing business in this state shall, upon the demand of any person or persons interested, establish reasonable joint through rates for the transportation of freight between points upon their respective lines within this state, and shall receive and transport freight and cars over such route or routes as the shipper shall direct. Car loads shall be transferred without unloading from the cars in which shipments were first made, unless such unloading in other cars shall be done without charge therefor to the shipper or receiver of such car load lots, and such transfer be made without unreasonable delay and less than car load lots shall be transferred into the connecting railway cars at cost, which shall be included in and made a part of the joint rate adopted by such railway companies or established as provided by this act. When shipments of freight to be transported between different points within this state are required to be carried by

two or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodations to local or state traffic as they give to the interstate traffic over their lines of road.

“Section 3. In the event that said railway companies fail to establish through joint rates or fail to establish and charge reasonable rates for such through shipments, it shall be the duty of the board of railroad commissioners, and they are hereby directed, upon the application of any person or persons interested, to establish joint rates for the shipment of freight and cars over two or more connecting lines of railroad in this state, and in the making of such rates, and in changing or revising the same, they shall be governed as near as may be, by all the provisions of chapter 28 of the Acts of the Twenty-second General Assembly, and shall take into consideration the average of rates charged by said railway companies for shipments within this state for like distances over their respective lines, and rates charged by the railway companies operating such connecting lines for joint interstate shipments for like distances. The rate established by the board of railroad commissioners shall go into effect within ten days after the same are promulgated by said board, and from and after that time the schedule of such rates shall be *prima facie* evidence in all of the courts of this state that the *rates therein fixed are reasonable and just maximum rates for the joint transportation of freight and cars upon the railroads for which such schedules have been fixed.*

“Section 4. Before the promulgation of such rates as provided in section 3 of this act, the board of railroad commissioners shall notify the railroad companies interested in the schedule of joint rates fixed by them; and they shall give said railroad companies a reason-

able time thereafter to agree upon a division, and to notify the board of such agreement, and the board of railroad commissioners shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal facilities, and all the circumstances of the haul, and the division so determined by the board shall in all controversies or suits between the railroad companies interested, be *prima facie* evidence of a just and reasonable division of such charges.

"Section 5. Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this state is hereby prohibited and declared to be unlawful, and each and every one of the companies making such unreasonable and unlawful charges, or otherwise violating the provisions of this act, shall be punished as provided in chapter 28 of the Acts of the Twenty-second General Assembly for the making of unreasonable charges for the transportation of freight and cars over a single line of railroad by a single railroad company.

"Section 6. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the *Iowa State Register* and the *Des Moines Leader*, newspapers published in the city of Des Moines, Iowa." Acts, Twenty-third General Assembly, chapter 17.

After the case had been remanded, the plaintiff amended its bill by alleging that, since the filing of the original bill and the amendment thereto, the defendants, in furtherance of their unlawful attempt to execute said joint-rate statute, did on October 7, 1890, promulgate and issue, and are now attempting to enforce, and will enforce, unless restrained by order of this court, the following joint or through rate or order as made by them:

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**"IOWA FREIGHT RATES."**

**"Revised Schedule of Reasonable Maximum Rates for the Transportation of Freight within the State of Iowa.**

**"Notice is hereby given that, in pursuance of the Acts of the Twenty-second General Assembly of the state of Iowa, the schedule of reasonable maximum rates of charges for the transportation of freight within the state of Iowa now in effect on the respective lines of railway of said state has been revised and amended by the adoption of the following:**

**"From and after the 25th day of October, 1890, the following railroad companies engaged in the business of common carriers and doing business within the state of Iowa, viz.: [here follows the names of all the railroad companies in Iowa] shall be governed by the following rule in making rates for passing over two or more lines within the state: The maximum rate of freight to be charged by any railroad company receiving business from a shipper at a station on its line within the state of Iowa destined to a point within the state of Iowa on another line of railroad, or receiving freight originating within the state of Iowa on the line of another railroad and destined to a point within the state of Iowa on its line, shall be eighty per cent. of the schedule of reasonable maximum rates of charges for the transportation of freight and cars in Iowa as fixed by the board of railroad commissioners of Iowa, and now in effect. October 8, 1890." (Signed by the commissioners.)**

The amendment avers "that said order is unlawful, and was promulgated and issued without authority of law, and in excess of the powers of said railway commission; and the statute pretending to authorize any such schedule of joint through rates is void, and in conflict with the various provisions of the constitution of the United States, and that of the state of Iowa, for

the reasons heretofore fully set out." The prayer attached to this amendment asks that the defendants be enjoined and restrained from attempting to enforce or execute said order, and also prays that they be restrained from putting into effect any other order compelling petitioner to enter into joint through rates of freight charges under said pretended statute with other railroad companies.

October 9, 1891, the defendants demurred to the petition as amended, because: *First*. The petition and its amendments do not show any facts which entitle the plaintiff to the relief demanded. *Second*. The statute complained of in the petition is constitutional and valid, and has been so held by the supreme court. On the hearing of this demurrer the district court held that the facts stated did not entitle the plaintiff to the relief demanded, or to any relief, and sustained the demurrer. The plaintiff excepted to the ruling, and, failing to further amend its petition, and electing to stand thereon, judgment was rendered against it on said demurrer, and for costs, to which it excepted and appealed.

The italicized words in section 3 of chapter 17, above set out, were not in the act originally, but were incorporated therein by amendment by chapter 25 of Acts of the Twenty-fourth General Assembly. It is contended that the case as now presented raises no question not involved in and passed upon by this court in its opinion on the former appeal. If this be so, it can only be determined by an examination of the issues as made in each case.

II. If the contention of the state is correct, that this case involves no legal question not passed upon on the former appeal, it is decisive of the case, as we are precluded on this second appeal from reviewing questions presented and passed upon on the first hearing. It will be observed that the petition on the former trial

below was attacked by a motion to dissolve the injunction which had been issued. The legal effect was the same as though the defendant had challenged its sufficiency by a demurrer. On the former appeal the sufficiency of the allegations of the petition, as then amended, to justify the granting of the relief therein prayed, were exhaustively considered, and this court held that the petitioner was not entitled to the relief prayed. Now, wherein are the issues changed from what they were on the former appeal? What new legal question or questions are presented by the pleadings? The only change in or addition to the plaintiff's bill is, that it has by an amendment made since the former hearing pleaded the order of the railroad commissioners fixing maximum joint rates, and ordering that they take effect on a certain day. This amendment avers that the order is made without authority of law, and in excess of the powers of the commission; that the statute authorizing it is void, "and in conflict with the various provisions of the constitution of the United States, and that of the state of Iowa, for the reasons heretofore fully set out." And each and all of the reasons so referred to are to be found in the petition as amended, and as passed upon by this court in its opinion on the first appeal. It was then pleaded, that the act under which the commissioners have since made the order was void, and for many reasons, not necessary to be again repeated, in conflict with the federal and state constitutions. In no respect is any new legal question presented by this appeal.

Counsel for the petitioner, it is true, in argument, and with great ability, urge that the order made, fixing the reasonable maximum joint rate at eighty per cent. of the schedule of reasonable rates already in force, is, on its face, unreasonable; but no such claim is made in the amendment. The amendment charges that the rate is unlawful, and in excess of the powers of the

commission, not because of the unreasonableness of the rate fixed, but because the statute under which the order is made is unconstitutional and void, for reasons set out in the original bill and the first amendment thereto. We think the amendment, fairly construed, does not raise any issue as to the reasonableness of the rate in fact made. The objection made to the order is that there was a want of power to make any such order, because of the illegality and unconstitutionality of the legislation which authorized it. That question was made and passed upon on the former appeal, and is the law of this case.

The law is well settled in this state by an unbroken chain of decisions that, as between the parties to a suit, a decision therein becomes an adjudication even if erroneous; that on a second appeal in the same case, when the same legal questions are presented, this court will not revise, reverse, or review its former decision. Such decision will stand as the law of that case. *Adams Co. v. B. & M. R'y Co.*, 55 Iowa, 97; *Barton v. Thompson*, 56 Iowa, 571; *Simplot v. City of Dubuque*, 56 Iowa, 639; *Wagon Co. v. Swezy*, 63 Iowa, 520; *Oil Co. v. Montague*, 65 Iowa, 67; *Ellis v. State Ins. Co.*, 68 Iowa, 578; *District Township of Clay v. Independent District of Buchanan*, 69 Iowa, 88; *Raridan v. Central Iowa R'y Co.*, 69 Iowa, 527; *Drake v. Chic. R. I. & P. R'y Co.*, 70 Iowa, 59; *Davis v. Curtis*, 70 Iowa, 398; *Babcock v. Chic. & N. W. R'y Co.*, 72 Iowa, 197; *Windsor v. Cobb*, 74 Iowa, 709; *Lewis v. Burlington Insurance Co.*, 80 Iowa, 259; *Smith v. Foster*, 85 Iowa, 705. These authorities are in harmony with the decisions in other states upon this question. Elliott, App. Proc. section 578, and cases cited. This rule is held, in the cases cited, to apply even though the court on a second appeal may believe that the first decision was erroneous; and so it has been held to apply in a case where, since the decision on the first appeal and

the second trial in the lower court, the supreme court has in another case overruled the former decision. *Barton v. Thompson*, 56 Iowa, 572. And the rule has been held to apply even though there has been, as in this case, a change in the members of the court between the two appeals. *Parker v. Pomeroy*, 2 Wis. 122.

In thus disposing of this case we are not to be understood as approving of the correctness of the former holding. Some of us are content with the result reached in the former opinion; others—the writer included—do not approve of some of the reasoning and conclusions found in the opinion rendered by a majority of the court as then constituted, and do not wish to be considered as bound by it in any other case. **AFFIRMED.**

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THE STATE OF IOWA, Appellee, v. WM. B. GADBOIS *et al.*, Appellants.

1. **Burglary: CIRCUMSTANTIAL EVIDENCE.** The defendants were convicted of burglary in the nighttime, upon evidence which was wholly circumstantial, but which is considered in the opinion, and held to be sufficient to support the verdict.
2. ———: **COMPLICITY OF DEFENDANTS: EVIDENCE.** Where the state claimed that the defendants were concerned jointly in the burglary for which they were indicted, and they had denied that they had ever met before their arrest, the state was properly permitted to prove that they had been seen together in several different places in Iowa during a period of nearly two years before the burglary was committed.
3. ———: **EVIDENCE: SCHEDULE TIME OF TRAINS.** Where, in a prosecution for burglary, it became material to show the times of the arrival and departure of trains at a certain time and place, *held*, that, it was competent to show the schedule of time for the trains at the time and place in question, without showing that they actually arrived and departed on that time.

89	25
90	538

99	25
103	725

89	25
115	132

89	25
119	332

89	25
125	146

89	25
134	154

89	25
135	51
135	72.
135	742

4. ———: INTRODUCTION OF EVIDENCE: ORDER. Where, in a prosecution for burglary, several witnesses for the state, while it was introducing its evidence in chief, testified to the whereabouts of the defendants on a certain morning, and afterwards the defendants introduced evidence to show that they were in another county on the morning in question, *held*, that it was no abuse of the discretion of the court to allow the state to call other witnesses, after the defendants had rested, to testify that the defendants were in the place stated by its first witnesses at the time referred to.
5. ———: OFFER OF INCOMPETENT EVIDENCE: PREJUDICE: NEW TRIAL. In a prosecution for burglary, the county attorney offered, in the presence of the jury, to prove that the defendants had pleaded guilty to a burglary committed by them in another county. The evidence was rejected upon the defendant's objection, but the defendants, after a verdict of guilty, made the offer of the evidence a ground for a motion for a new trial. *Held*, that, while the offered evidence was clearly incompetent, and the very fact of offering it might have been prejudicial to the defendants, and the granting of a new trial on that ground would have been approved by this court, yet, whether the defendants were actually prejudiced was a question to be decided by the district court, in the exercise of a wise discretion, and, that court having denied a new trial on the ground stated, the supreme court would not interfere.

*Appeal from Benton District Court.*—HON. J. R. CALDWELL, Judge.

THURSDAY, OCTOBER 5, 1893.

THE defendants were accused of the crime of burglary in the nighttime, tried by jury, found guilty, and adjudged to be imprisoned in the state penitentiary at Anamosa at hard labor for the term of six years. From that judgment they appeal.—*Affirmed*.

*John Y. Stone*, Attorney General, and *Thos. A. Cheshire*, for the State.

*Burnham & Gaasch* and *D. E. Voris*, for appellants.

ROBINSON, C. J.—During the night of the twenty-ninth day of November, 1892, the store of W. H. Burrows & Company, in Belle Plaine, was broken into, and merchandise amounting in value to nearly three

hundred dollars was stolen from it. On the third day of the next month, the merchandise so taken was found packed in satchels and a box under the hay in certain hay barracks in the town of Watkins, about fifteen miles east of Belle Plaine. During the night of that day, the defendant William B. Gadbois was seen to enter the barracks, and was arrested soon after he left them, and his codefendant, L. F. Widner, was arrested during the same night, within a short distance of the town.

I. The appellants contend that the evidence was not sufficient to authorize a conviction of either of them. They were not seen to commit the offense of which they are charged, none of the stolen property was found in their possession or under their control, and they have not admitted their guilt. To sustain their conviction the state relies wholly upon circumstantial evidence, which shows substantially the following: At the time of the burglary, Gadbois resided in Cedar Rapids, thirty-five miles east of Belle Plaine; and Widner at Marion, a few miles further away. Cedar Rapids, Belle Plaine, and Watkins are on the main line of the Chicago and Northwestern Railway, and trains pass each way through them during the nighttime. A witness testified that he saw the defendants in Belle Plaine at 3 o'clock in the afternoon of the day which preceded the burglary, near the store which was broken into; and another, who was a car repairer, states that he saw them in the railway yards about 9 o'clock in the evening, that he talked with them, and that they asked about the trains going out. He also stated that he saw them in a store in the town an hour or two earlier. A witness testified that at about 7:30 o'clock in the morning of November 30, 1892, he saw through a church window in Watkins, two men moving about. He started for the church, but before he

1. BURGLARY:  
circumstantial  
evidence.

arrived two men left it and went away. They resembled the defendants, and he thinks, although he is not positive, that they were the defendants. Several witnesses testify that, between 8 and 9 o'clock that morning, the defendants took breakfast at the house of Joseph Brecht, two and one half miles southeast of Watkins. They wore their hats pulled down over their foreheads while eating, and remained but a few minutes. An hour or two later they were seen about five miles southeast of Watkins. In the evening of December third, soon after the 10 o'clock train came in from the east, Gadbois was seen, by persons watching, to come around a corner about twenty-five yards north of the hay barracks. He walked towards the barracks, looked around, and then walked towards a church, which was about fifty yards in a northeasterly direction from the barracks. He walked about thirty yards, and looked west toward the schoolhouse; then walked back of the barracks, and whistled twice; then walked towards the church again, looked around, and came back, went into the barracks, and remained but a short time; then came out and walked rapidly northward to the corner; then turned west towards the school house, which was about two and one half blocks west, and a little north of the barracks. When he turned west, the watchers, among whom was the sheriff, followed him. The sheriff called to him to "halt," when he started to run. The sheriff fired a shot at him, and, after running about a block, he stopped, and was arrested. He was taken to a house, and asked where his partner was, and said he had no partner. He was then asked what the whistling was for, and answered, "I have nothing to say." He afterwards said, speaking of himself, that his name was Harry Dustan, and that he lived in Chicago. At a little after 10 o'clock, a man wearing a stiff hat and a light overcoat was seen driving a black horse westward,

about half a mile north of the town. Soon after that time a man wearing a light overcoat was seen to walk eastward towards the church, along a street which led from the direction of the schoolhouse, and in a very short time he was seen to go westward towards the school house. Being informed that a man had been seen going toward the barracks, the sheriff and a companion followed him, going north from the school house. After driving about a half mile they overtook the defendant Widner, who was driving a black horse attached to a roadwagon, and was wearing a stiff hat and light overcoat like that worn by the man who had been seen going westward north of Watkins, and eastward from the schoolhouse and then westward in Watkins. He was ordered several times to stop, but refused to do so until a gun was aimed at him. He stated that he had been visiting relatives at Millersburg, and was going to Marion. Millersburg is about thirty miles south of Watkins, and Marion is about the same distance in a northeasterly direction. The next morning he said he came from the south; that he had tied his horse by a schoolhouse or church, and had gone up town for feed for him, but having no money, and not wishing to beg, he went back. He and Gadbois, when arrested, said they had never seen each other before. The evidence showed that they had been seen together repeatedly before the robbery. Widner hired the horse and wagon he was driving, when arrested, in Marion, at about 1 or 2 o'clock in the afternoon of December 3, telling the owner at the time that he wished to go to Linn Grove, a place about five miles away.

Much testimony was given in behalf of the defendants, which tended strongly to show that Gadbois was in Cedar Rapids and Widner in Marion when the robbery was committed; and the testimony of the witnesses who claim to have seen the defendants in Belle

Plaine the day before and evening of the robbery is contradicted. But several witnesses who testified to the presence of the defendants at their homes at about the time the burglary was committed were impeached, and the testimony of others is in some respects improbable. The numerous witnesses who testified to having seen the defendants near Watkins the morning following the burglary, when their witnesses say they were in Linn county were wholly disinterested, and it is not probable that all of them were mistaken. They identified the defendants by their faces, their general appearance, their dress, and by certain peculiarities specified. If their testimony is true, that of several of the witnesses for the defendants was necessarily false. If the defendants were in and near Watkins during the morning following the burglary, and whether they were or not was a question for the jury to determine, then we are satisfied that the defendants are guilty of the offense charged. And even if they were not there at that time, their actions and statements immediately preceding and following their arrest can not be explained on any other reasonable hypothesis than that they were acting in concert, and had a criminal connection with the burglary, if they were not the sole perpetrators of it. We conclude that the evidence to sustain a conviction is sufficient.

II. The appellants complain of the ruling of the court in permitting the state to prove that the defendants had been seen together in several different places in Iowa during a period of nearly two years before the burglary was committed. There was no error in those rulings. The defendants had denied that they ever met before their arrest, and the state claimed that they were concerned jointly in the burglary. It was important to the state to show that the defendants had associated with each other before the burglary was committed, in

2. —: complicity of defendants: evidence.

order that the statements made by them when arrested might be considered and given due weight in connection with other circumstances which tended to show their guilt.

III. The state was permitted to prove the schedule time for the arrival of trains at Belle Plaine. The defendants complain of the admission of evidence of that character without proof that the trains arrived during the time in question on schedule time. The proof admitted tended to prove that it was customary for trains to arrive at certain hours, and we think it was admissible as tending to prove that they did so arrive at about the time the burglary was committed.

IV. While the state was introducing its evidence in chief, several witnesses testified to having seen the defendants at the house of Joseph Brecht on the morning of November 30th. After the defendants had submitted the evidence on their part, the state was permitted to introduce new witnesses, who also testified to having seen the defendants at Brecht's at the time stated. In admitting the testimony of the new witnesses there was no error. It is true, it might have been given as evidence in chief for the state, but it was also rebutting in its character. After the state rested, the defendants introduced evidence which tended to show that they were in Linn county at the time witnesses for the state located them in and near Watkins. The testimony in question tended to rebut that evidence. It may be true, as claimed by the state in argument, that it had no knowledge of the intention of the defendants to endeavor to show that they were in Linn county when the burglary was committed, and that it was not deemed necessary to prove by more than one or two witnesses that they were in and near Watkins on the morning of November 30th, until it was known that

3. —: evidence:  
schedule time  
of trains.

4. —: intro-  
duction: evi-  
dence: order.

the defendants denied that such was the case. Under these circumstances it was within the discretion of the district court to permit further proof on the part of the state to show where they were at the time in question.

V. During the progress of the trial the state introduced the clerk of the district court of Linn county,

5. —: offer of incompetent evidence: prejudice: new trial. who was permitted to state, against the objections of the defendant, that he had with him the criminal records of Linn county for the period of time commencing

in October, 1884, and ending in October, 1891. The witness was then asked this question: "Will you now please examine the criminal record of Linn county, Iowa, which you say you now have in your possession, and present in court, and state to this jury as to whether or not that criminal record discloses the fact that William B. Gadbois and L. F. Widner have within that period of time been convicted of the crime of burglarizing a hardware store jointly, in Marion, county of Linn, and state of Iowa; and further, if that record discloses the fact that the defendants, William B. Gadbois and L. F. Winder, did plead guilty to the charge of burglarizing the hardware store, and that they were upon their plea of guilty sentenced by the district court of Linn county, Iowa, to a term in the Anamosa penitentiary?" The defendants here objected to the question as incompetent, irrelevant and immaterial. Before there was a ruling on the objection the county attorney added to the question the following: "And does not that record disclose the further fact that D. E. Voris, of Marion, was the attorney for the defendant Widner in that case?" The defendants made the same objection to the question as amended, and it was sustained. They complain of the action of the county attorney in asking the question, and claim, in effect, that the ruling of the court in sustaining an objection to it did not cure the evil effects. Certainly there is much in this

claim. A person can not be proven guilty of one offense by showing that he committed another. No theory occurs to us, and none has been suggested, which justified the asking of the question. Counsel for the state do not attempt to defend it, but say that the only objection made to the question in the district court was sustained; therefore, that the defendants have no grounds for complaint. The defendants could do no more, when the question was asked, than to object to it, and when they were found guilty by the jury they made the misconduct of the attorney one of the grounds upon which it was based. We think they thus brought the matter properly before the court. The course of the attorney can not be approved. His purpose in having the clerk of the district court of Linn county produce in the presence of the jury and identify the record of criminal convictions which he described, and in asking the question set out, seems to have been to prejudice the jury against the defendants by incompetent means. What was done and said may well have led the jury to believe that the defendants had been guilty of the crime of burglary before the offense for which they were on trial was committed, and thus have inclined them to weigh less carefully than they should have done the evidence submitted, and to agree too readily to a verdict of guilty. Had the district court found that the unanswered question was prejudicial to the defendants, and had it sustained the motion for a new trial on that ground, we should have thought its action commendable. See *George v. Swafford*, 75 Iowa, 496. But improper questions are sometimes asked in good faith, without any sinister motive, and when objections to them are sustained the fact that they were asked should not be deemed sufficient ground for a new trial unless there is, at least reasonable presumption that prejudice has resulted from them. Whether there is such a presumption must in most cases depend upon circum-

stances and conditions which are peculiarly within the knowledge of the trial court. In this case the jury were charged carefully and at considerable length in regard to the quality and weight of evidence necessary to convict. It is possible that the objectionable question was not asked with any wrongful intent, and the district court has said that it did not constitute a sufficient ground for a new trial. We can not say that it erred in that respect.

We have examined the record with care, but do not find cause to disturb the judgment of the district court. It is, therefore, **AFFIRMED**.

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**THE STATE OF IOWA, Appellee, v. G. W. FIELD,  
Appellant.**

89	84
121	306

**1. Criminal Law: JURORS: DISQUALIFICATION: OPINION FORMED.**

The fact that a juror has formed an opinion as to the guilt or innocence of the accused does not necessarily disqualify him, under section 4405, subd. 11, of the Code, even though some evidence would be required to remove it. The opinion that disqualifies is such an one "as would prevent him from rendering a true verdict upon the evidence submitted on the trial."

**2. Intoxicating Liquors: SALES BY DRUGGIST AND PHYSICIAN: EVIDENCE OF GOOD FAITH.**

On the trial of a druggist, who was also a physician, on a charge of selling intoxicating liquors contrary to law, the court instructed that the good faith of the defendant was a material fact in his defense, but sustained objections to questions asked the defendant, as a witness, whether sales to two certain persons were made by him as a physician in good faith. *Held*, that this was error, but that it was without prejudice, in view of the fact that the defendant had several times emphatically testified that all sales made by him were made as a physician, and in good faith.

**3. ———: ———: GOOD FAITH: INSTRUCTION TO JURY.**

In such case, the court instructed the jury, that if it found that the liquor was sold and dispensed by the defendant in good faith, as a physician, to patients actually sick and under his treatment, to acquit. *Held*, that the instruction was in accord with section 2, chapter 35 of Acts of the Twenty-third General Assembly, and that to have so modified it as to justify sales to patients whom the defendant in good faith *believed* to be actually sick, would not have been warranted by the law.

*Appeal from Humboldt District Court.*—HON. LOT THOMAS, Judge.

THURSDAY, OCTOBER 5, 1893.

INDICTMENT for maintaining a liquor nuisance. Verdict of guilty, and a judgment from which the defendant appeals.—*Affirmed.*

*R. M. Wright and P. Finch*, for appellant.

*John Y. Stone and Thomas A. Cheshire*, for the State.

GRANGER, J.—I. At the impaneling of the jury to try the indictment two of the jurors answered that they  
1. CRIMINAL LAW: had formed opinions as to the guilt or  
jurors: dis- qualification: innocence of the accused from what they  
opinion formed. had heard; that it would require evidence to remove the opinions formed; and one of them said he did not think he could try the case just as fairly and impartially on the evidence and the law “as if he had never heard of the case in the world until he came into the jury box.” Each juror stated that he had not formed an unqualified opinion of the guilt or innocence of the defendant, and made such statements as to show that, while some evidence would be required to change his opinion upon the question of guilt or innocence, yet it was not such an opinion that the district court could not properly conclude that they could render “a true verdict upon the evidence submitted on the trial.” The opinion that disqualifies a juror is such a one “as would prevent him from rendering a true verdict upon the evidence submitted on the trial. Code, section 4405, subd. 11. Hence an opinion as to the guilt or innocence of the accused does not necessarily disqualify a juror, even though some evidence would be required to remove it. It must of necessity be, in any case

where an opinion is formed, that some evidence would be required to remove it. The statute evidently contemplates the existence of such an opinion as will not prevent a juror from rendering a true verdict, for it requires the court to find whether or not the opinion formed, if any, will prevent such a verdict. We think there was no error in not excluding the jurors. See *State v. Bruce*, 48 Iowa, 534; *State v. Sopher*, 70 Iowa, 496; *State v. Vatter*, 71 Iowa, 558; *State v. Munchrath*, 78 Iowa, 268.

II. The defendant was a physician, and kept a drug store. The evidence shows that people would go to his store and ask for "red medicine," which meant whisky, or "white medicine," which meant alcohol, and obtain it. A theory of the defense is that whatever was obtained was prescribed by the defendant as medicine. Two witnesses testified that they bought red or white medicine of the defendant, and mixed it with water and drank it. The defendant was a witness in his own behalf, and, after stating the particulars of the sales to the two witnesses,—as that they came saying that they were not well, and what he let them have was as their physician, and as medicine,—he was asked as to each sale to "state whether or not it was done in good faith or otherwise?" The questions were each objected to as immaterial, and the objection sustained. The questions were not immaterial. Their competency is not brought in question in this case. The court, in its instructions, recognized the materiality of good faith in making the prescriptions by the defendant as a physician, and only permitted the defendant to justify the acts of selling on the basis of their being medical prescriptions, made in good faith. But we think the error is not prejudicial, because the testimony sought was several times given as to sales to other witnesses without objection, and the defendant, in testifying as to

2. INTOXICATING  
liquors: sales  
by druggist  
and physician:  
evidence of  
good faith.

prescriptions for one Tokhiem, said: "I did that as a physician, and it was done in good faith." He then made this general statement: "All the white and red and brown medicine obtained from me was dispensed in the manner I have stated, and that was done by me as a physician in good faith." It may be stated that there is no fact made more prominent in the testimony of the defendant than that his prescriptions were made in good faith.

III. The court instructed the jury that if they found that the liquor was sold and dispensed by the defendant in good faith, as a physician, to patients actually sick and under his treatment, to acquit. Complaint is made of the instruction, because it limits the sales to cases of actual sickness; and defendant asked an instruction with the rule so changed as that the sale would be justified if made "to patients who were actually sick, or, whom the doctor in good faith believed to be actually sick." The law by which licensed physicians are excepted from the operations of the law prohibiting sales of intoxicating liquor, fully sustains the action of the court. Section 2, chapter 35, of Acts of the Twenty-Third General Assembly, is the one in general terms prohibiting such sales, and as to physicians it contains this proviso: "Provided further that this section shall not be construed to prevent licensed physicians from dispensing in good faith such liquors as medicine to patients actually sick, and under their treatment at the time of such dispensing." The rule contended for would require us to ingraft upon the proviso a clause evidently not intended, and certainly not within its present letter or spirit. The refusal of the court to give another instruction asked by the defendant is controlled by the same considerations.

The judgment is **AFFIRMED**.

THE STATE OF IOWA, Appellee, v. CLAUD L. CHASE,  
Appellant.

1. **Evidence: SECONDARY: WHEN ADMISSIBLE.** Where a chattel mortgage, which was in the defendant's possession, was material as evidence for the plaintiff, and the defendant and his counsel had been served with notice to produce it on the trial, which they failed to do, and, in response to the question of the court, as to what answer he had to make to the notice, the defendant's counsel replied, "Not any," *held*, that there was no error in admitting the official record of the mortgage, when offered by the plaintiff.
2. **Instructions to jury: WHOLE CHARGE TO BE CONSIDERED.** Where, in a criminal prosecution, the intent to defraud was an essential element of the crime charged, and the court so instructed the jury in one paragraph of the charge, it was not error to omit this element of the crime in subsequent paragraphs, when the whole charge, taken together, clearly and correctly defined the crime.

*Appeal from Madison District Court*—HON. A. W. WILKINSON, Judge.

THURSDAY, OCTOBER 5, 1893.

THE defendant was indicted, tried and convicted of the crime of obtaining money by false pretenses, and judgment entered against him, from which he appeals.  
*Affirmed.*

*A. R. Dabney*, for appellant.

*John Y. Stone*, Attorney General, for the State.

GIVEN, J.—I. The appellant complains that on the trial the court admitted in evidence, over his objection, the record of a chattel mortgage as found in the chattel mortgage records of Madison county. The objection insisted upon is that the record was not the best evidence. The appellee's additional abstract shows that the note secured

1. **EVIDENCE:**  
**secondary:**  
**when admissi-**  
**ble.**

by this mortgage had been paid off, that the note and mortgage had been surrendered to the defendant, the maker; and that notice had been served upon the defendant and his counsel to produce said mortgage at the trial. This he failed to do. That when the notice was introduced in evidence to the court, the court inquired of counsel for the defendant, "What response have you to make in reference to the production of the papers?" to which he answered, "Not any," whereupon the objection was overruled. There was no error in overruling the objection. If the defendant or his attorney did not have the mortgage, counsel should have so responded; and if they did have it they should have produced it, or submitted to the use of the secondary evidence.

II. The appellant contends that the court failed to instruct that the false pretenses alleged must have been made with intent to defraud. It is conceded that the court did so instruct in the fifth paragraph of the charge, but the complaint is that this element of the crime, namely, intent to defraud, was omitted in subsequent paragraphs. The instructions must be taken together, and, when so taken, correctly and clearly define the offense charged.

III. The appellant's remaining contention is that "the court erred in directing the attention of the jury to the facts sought to be established by the appellee to the exclusion of any reference whatever to the facts sought to be established by the appellant." An examination of the instructions fails to sustain this complaint. There is no statement of the facts as sought to be established by the state, further than was necessary to a correct presentation of the issues, and what was required to be established to convict.

The judgment of the district court is **AFFIRMED**.

DOUGLASS & HEMINGWAY, Appellants, v. OLIVER S.  
MOSES, Appellee.

1. **Sale of Horse: ACTION ON EXPRESS WARRANTY: INSTRUCTION TO JURY.** In an action upon an express warranty in the sale of a horse, an instruction that "if no representations were made at the time of sale, but the plaintiffs looked him (the horse) over, and took him upon their own judgment, without asking anything about the horse, then they can not recover in this action, and your verdict will be for the defendant," is approved.
2. ———: **EXPRESS WARRANTY: TIME OF MAKING.** An express warranty of personal property, made after a part of the purchase price has been paid, but before the property has been delivered, and the remainder of the price paid, is binding.
3. ———: ———: **BREACH: MEASURE OF DAMAGES.** For the breach of an express warranty in the sale of a horse, the measure of damages is the difference between the actual value of the horse at the time of the sale, and what he would have been worth if he had been as represented or warranted, as shown by the evidence.

*Appeal from Cedar District Court.*—HON. JAMES D.  
GIFFEN, Judge.

THURSDAY, OCTOBER 5, 1893.

THIS is an action at law to recover damages of the defendant for the breach of an alleged warranty of a horse sold by the defendant to the plaintiffs. There was a trial by jury, which resulted in a verdict and judgment for the defendant. The plaintiffs appeal.—*Reversed.*

*T. Todd and W. N. Treichler* for appellants.

*Wheeler & Moffit* for appellee.

ROTHROCK, J.—I. The claim made in the petition is that the plaintiffs purchased a horse of the defend-

1. SALE of horse:  
action on ex-  
press warrant-  
ty: instruction  
to jury.

ant, for which they paid one hundred and fifty dollars, and that the purchase was effected by reason of a warranty by the defendant that the horse was a gelding, and that he was sound and gentle, when in fact he was not a gelding, and had not been fully castrated, but had one testicle remaining, and that said horse was not sound and gentle. There are averments in the petition that the statements made as to the horse being a gelding, and sound and gentle, were false and untrue; but there is no averment that the defendant knew that the statements were false. The action, then, was for a breach of an express warranty. It was tried as an action for a breach of an express warranty, and will be so considered here.

The court properly charged the jury as to what constituted an express warranty; the appellants complain of a part of the charge, because it directed the jury that, "if no representations were made at the time of sale by the defendant, but the plaintiffs looked him (the horse) over, and took him upon their own judgment, without asking anything about the horse, then they can not recover in this action, and your verdict will be for the defendant." This instruction embodies what is denominated in the law as the rule of *caveat emptor*. It is urged that the instruction is erroneous, because it precluded the jury from considering the fraudulent concealment of defects in the horse, and the breach of an implied warranty. It is enough to say of these objections that the case made by the petition is upon an express warranty, and the rule contended for by counsel has no application to the case.

II. It is claimed that the verdict is contrary to the evidence. It is conceded that the horse was what is known as a "ridgling," which is defined to be "the male of any beast, half gelt." The purchase of the horse was made at

2. —: express  
warranty: time  
of making.

the city of Cedar Rapids. Neither the plaintiffs nor the defendant resided at that place. The plaintiffs were buyers and shippers of horses, and their place of business was West Branch, in Cedar county. The defendant had the horse at a feed stable. The horse was examined by the plaintiffs, and a price was agreed upon, and five dollars was paid, and the animal was delivered the next morning, at which time the plaintiffs paid to the defendant one hundred and forty-five dollars. There is evidence to the effect that before the five dollars was paid the defendant stated that the horse had been gelded, and that he was sound, all right, and safe; and the evidence shows beyond all question that on the next morning, and before the one hundred and forty-five dollars was paid, the defendant in answer to inquiries by the plaintiffs, stated in positive terms that he had the horse gelded some months before that. It is true that the defendant in his testimony as a witness denied that he made the statement that the horse had been castrated before the five dollar payment was made. But he did not deny the testimony of three witnesses that, before the one hundred and forty-five dollar payment was made, he stated in the most positive terms that the horse had been castrated. He not only did not deny that he made such statements, but the evidence shows without dispute that he then knew that the statement was false. It is claimed in behalf of the appellee that, when the five dollars was paid, there was a completed sale, and there could be no warranty after that time, and before the balance of the purchase money was paid. The case of *Bank v. Reno*, 73 Iowa 145, is cited, in support of the above proposition. It is scarcely necessary to say that the cited case has no application to the question now under consideration. That was a case where, after part payment of the purchase money had been made, a creditor of the seller caused an execution to be levied upon the property, and the con-

troversy was between the purchaser and the creditor. If this was a completed sale of the horse as between the parties upon the payment of the five dollars, it would have been the right of the defendant to have compelled the plaintiff to pay the balance of the purchase money, notwithstanding a breach of warranty. That a binding warranty may be made after payment of part of the purchase money, and before the delivery of the property, see *McGaughey v. Richardson*, 20 N. E. Rep. (Mass.) 203.

III. It is claimed by the appellee that, conceding there was an express warranty, and a breach thereof, as alleged in the petition, the jury were warranted from the evidence in finding that the whole price paid by plaintiffs did not exceed the actual value of the horse in the condition he was at the time of the sale. But that is not the measure of damages. The court correctly instructed the jury that the measure of damages "would be the difference, if any, of the actual value of the horse at the time of the sale and what he would have been worth if he had been as represented or warranted, as shown by the evidence." This instruction was the law of the case, and if the jury had followed it they would have returned a verdict for the plaintiff for not less than fifty dollars. The defendant testified as a witness that the difference in value was from fifty dollars to seventy-five dollars. Other witnesses placed it at a greater sum. There was no witness who gave the difference in value at less than from twenty dollars to fifty dollars. Some of them fixed the difference at one hundred and fifty dollars. We have said that the instruction as to the measure of damages was the law of the case, and that it was correct. It has been the law of this state for more than thirty years. *Likes v. Baer*, 8 Iowa, 368; *Lacey v. Straughan*, 11 Iowa, 258; *Gates v. Reynolds*, 13 Iowa, 1; *Callanan v. Brown*, 31 Iowa, 333.

s. —: —:  
breach: meas-  
ure of dama-  
ges.

We think the court should have sustained the motion for a new trial on the ground that the verdict was contrary to the evidence. REVERSED.

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WARREN COUNTY, Appellant, v. POLK COUNTY,  
Appellee.

**Criminal Law: DEPOSIT OF MONEY IN LIEU OF APPEARANCE BOND: FORFEITURE AFTER CHANGE OF VENUE: WHAT COUNTY ENTITLED TO MONEY: PRACTICE.** Where one charged with a crime was bound over to appear at the district court of the defendant county, and he deposited money with the clerk in lieu of a bond, and, after indictment and two trials, in which the jury failed to agree, he took a change of venue to the plaintiff county, but the money was not transmitted with the papers to the plaintiff county, and he made default, *held*, that the district court of the plaintiff county alone had jurisdiction to declare the money forfeited, and that it should have declared it forfeited to the plaintiff county for the benefit of its school fund; but that said court, having jurisdiction of the subject-matter, and having erroneously ordered the clerk of the defendant county to pay the money to the treasurer of that county, the order was binding until set aside upon appeal, writ of error, *certiorari*, or other appropriate proceeding, and that, after a lapse of more than five years, the plaintiff county could not maintain an action against the defendant county for the recovery of the money.

*Appeal from Polk District Court.*—HON. W. F. CONRAD,  
Judge.

FRIDAY, OCTOBER 6, 1893.

THIS is an action at law, by which the plaintiff seeks to recover of the defendant the sum of seven hundred dollars which was deposited with the clerk of the district court of Polk county by one Ackerman to secure his appearance in the proper court on a criminal charge. Ackerman failed to make an appearance, and forfeited the money. The plaintiff county claims that it is entitled to the money for the benefit of its school fund. There was a demurrer to the petition, which was sustained. The plaintiff stood upon the petition, and judgment was rendered against it, and it appeals.  
—*Affirmed.*

*O. C. Brown*, County Attorney, for appellant.

*W. A. Spurrier*, County Attorney, for appellee.

ROTHROCK, J.—It appears from the averments of the petition that one Ackerman was indicted in Polk county for the crime of larceny. His bail was fixed at seven hundred dollars, which sum he deposited with the clerk of the district court of Polk county. He appeared in obedience to his obligation to do so, and was twice put upon trial in that county, at each of which trials the jury failed to agree upon a verdict. He then made application for a change of the place of trial, and a change was granted, and the case sent to the district court of Warren county. The clerk of the district court of Polk county certified a transcript of the record to the district court of Warren county, but did not transmit the money deposited in lieu of bail. The case was docketed in Warren county, and assigned for trial. Ackerman failed to appear, and made default, and the district court of Warren county, by a proper order, declared the bail money forfeited, and ordered that the clerk of the district court of Polk county should pay to the treasurer of Polk county the said sum of seven hundred dollars. This order was made on the sixth day of January, 1885, and this action was commenced on the nineteenth day of February, 1890. It is claimed in the petition that the district court of Warren county, upon the forfeiture of the money, should have ordered the clerk of the Polk district court to pay the money to the treasurer of Warren county.

The demurrer to the petition properly raised the question whether upon the above facts the court should have held that the plaintiff county was entitled to recover the money from the defendant, and this is the sole question presented by the appeal. It is not necessary to set out the demurrer, nor to consider any

other averments of the petition than appear from the above statement of facts. The argument of counsel is founded to some extent on certain conclusions of law as to whether the district court in Warren county had power to declare any forfeiture of the money. Aside from all legal conclusions which are pleaded in the petition, the rights of the respective parties to the money in controversy must be determined upon the application of the law to the facts above stated.

Section 4377 of the Code prescribes the duty of the clerk of the district court from which an order for change of venue has been made. It is as follows: "Upon making the order, if there be more than one defendant in the case, unless all have joined in the petition, the clerk must make out and certify a transcript of all papers on file in the case, including the indictment, and file the same in his office, and a certified copy of all record entries and all the original papers on file must be without unnecessary delay transmitted to the clerk of the court to which the change of venue is ordered." And section 4380 provides that "the court to which such change of venue is granted must take cognizance of the cause, and proceed therein to trial, judgment and execution, in all respects as if the indictment had been found by the grand jury impaneled in such court." It is apparent from these provisions of the Code that, if the defendant in the criminal action had given a bond for his appearance, it was the duty of the clerk of the court in Polk county to transmit the bond to the clerk of the court of Warren county. And it is equally plain that the district court of Polk county had no further jurisdiction of the criminal case, nor of anything pertaining thereto. For all purposes the case was pending in Warren county, the same as if the indictment had been found by the grand jury of that county. And if the bail had been by bond instead of money, no court except the district

court of Warren county had jurisdiction to declare a forfeiture of the bond; and an action upon a bail bond given for appearance upon a change of venue should be brought in the county to which the venue is changed. *Decatur County v. Maxwell*, 26 Iowa, 398. It is further provided by statute that "fines and forfeitures not otherwise disposed of go into the treasury of the county where the same are collected for the benefit of the school fund." Code, sec. 3370. And the county in which a forfeited appearance bond is collectible is entitled to the proceeds thereof for the use of the school fund. *Lucas County v. Wilson*, 61 Iowa, 141. In that case the action was brought by the county to which a change of venue had been taken. We think there can be no doubt that the district court of Warren county had jurisdiction to declare the forfeiture.

The difficulty in declaring the rights of the parties to this money arises from the fact that no bond was given, but money was deposited in lieu of the bond. It is the right of a person from whom an appearance bond is required to deposit money in lieu of a bond. Code, sec. 4589. The statute does not expressly provide what shall be done with the money so deposited where a change of venue has been ordered. We think it would be correct practice to order the money to be transmitted to the clerk of the court to which the change is taken. As we have seen, the court from which the change was taken has no further jurisdiction of the case, nor of any question pertaining to the case. It has no more power to order a forfeiture of the money than it would have had to forfeit a bail bond if one had been given. But whether the money be transmitted or not, the district court of Warren county had jurisdiction to order a forfeiture. This brings us to the vital question in the case, and that is, did the court

have jurisdiction to order the money to be paid to the treasurer of Polk county?

It is an elementary rule that where a court has jurisdiction of the subject-matter, which means the power to decide the question presented, and jurisdiction of the parties, an error in the decision can not be the grounds of an independent action. The only remedy in such cases is by appeal or writ of error, *certiorari*, or other appropriate proceeding. There can be no possible question that the district court of Warren county had the power to forfeit the money in controversy. The fact that it ordered the payment of it to the treasurer of the county not entitled to it was an error which should have been corrected by appeal. But it is claimed that the county of Warren was not a party to the criminal action. This is true in the sense that it was not named in the record. But the state was a party, and the state was represented by the district or county attorney, whose right and duty it was to insist that a proper order of forfeiture should be made. The county is not an exclusive party plaintiff in actions upon bail bonds. The records of this court show that many actions have been maintained on such bonds in the name of the state; and the state, which is represented by the county or district attorney, could have had the order reviewed by appeal. Such a proceeding would surely have been more appropriate than an original action, brought more than five years after the order complained of was made, and when it is to be presumed that the seven hundred dollars is no longer a part of the revenue of the county, but has long since been expended as required by law. The judgment of the district court is **AFFIRMED**.

THE STATE OF IOWA, Appellee, v. J. M. ALLEN,  
Appellant.

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98	705
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1130	486

1. **Criminal Law: MISCONDUCT OF JURORS: NEW TRIAL: DISCRETION OF COURT.** Where in a criminal case a new trial was asked upon affidavits showing that two of the witnesses for the state, severally, and at different times, spoke to one of the jurors during the intermissions of the court, and while the trial was pending, eulogizing the prosecuting witness, and condemning the defendant; and that the foreman of the jury, during such an intermission, stated to a friend that court had to adjourn to give the prosecuting witness a rest, as the attorneys had worried him outrageously; and that the foreman, when the jury retired to consider its verdict, was apparently very anxious to procure a verdict against the defendant; and the trial court refused a new trial upon the case made, *held*, that the supreme court would not interfere, there being no showing that the juror encouraged the remarks of the witnesses, or believed what they said, or that the prosecution was in any way responsible for the irregularities complained of, or that the defendant was prejudiced thereby.
2. **Evidence: ERROR WITHOUT PREJUDICE.** Permitting improper questions to be asked a witness is not reversible error, where the answers are such that the appellant could not have been prejudiced thereby.

*Appeal from Cass District Court.*—HON. N. W. MACY,  
Judge.

FRIDAY, OCTOBER 6, 1893.

INDICTMENT for "uttering and passing a false and forged promissory note." There was a verdict of guilty, and a judgment, from which the defendant appeals.—*Affirmed.*

*De Lano & Meredith*, for appellant.

*John Y. Stone*, Attorney General, and *Thomas A. Cheshire*, for the State.

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GRANGER, J.—Chauncey Slater and Sam Eagan were subpoenaed and in attendance as witnesses on the part of the state at the trial of the indictment. But one of them, Eagan, was examined as a witness. J. F. Harvey was one of the jurors impaneled to try the indictment. He makes the following affidavit, as one upon which a new trial should have been granted by the district court:

“I, J. F. Harvey, being first duly sworn, on my oath depose and say that I was a member of the jury at the present term of this court, before which the case of the State of Iowa *v.* J. M. Allen was tried. That at one time, as I was leaving the courthouse after an adjournment of the court for the noon recess, or at the close of the day, and while the said cause was on trial before the said court and jury, one Chauncey Slater, who was present during the said trial as a witness for the state, as I am informed and believe, fell in company with me as I was leaving the said courthouse, and accompanied me down to Walnut street, and, while on the way to the place where we parted company, he began to talk with me concerning the prosecuting witness, N. Hamlin, and persisted in telling me that he had known him for a great many years; that he was a nice old man; that nobody was ever turned away from his place hungry, and eulogized him very highly as a man; that there was nothing good in the defendant, Allen, and he was imposing on the old man, Hamlin, and spoke very disrespectfully of and concerning said Allen. That, as we parted, said Slater asked me why I did not come out to see him, and told me, if I got out in that part of the country, the latchstring was out. That, soon after the verdict was rendered in said case, I met the said Slater again, and he shook hands with me, and took occasion to congratulate me on the verdict rendered; that I did not invite the conversation

1. CRIMINAL LAW:  
misconduct of  
jurors: new  
trial: discre-  
tion of court.

with the said Slater concerning the said Hamlin, but tried to turn the conversation upon some other subject; that, at another time during the said trial, one Sam Eagan, who was a witness upon the part of the state, made it convenient to fall in with me as I was leaving the courthouse, and walked through the park and down the street with me, and commenced a conversation with me concerning the old man, Hamlin, the prosecuting witness, and said Eagan remarked to me that he had known Hamlin a good many years; that he was a nice old man; that nobody had anything against him, in any shape, that he ever knew of; and that the defendant, Allen, was a kind of a scalawag, scapegoat, or something to that effect; that I did not begin or invite the said conversation with the said Eagan, and introduced conversation upon some other topic. And I further state that, after the jury had retired to consider upon a verdict in the said cause, the foreman of said jury, O. J. Ostrus, was apparently very anxious to secure and return a verdict against the defendant, and urged very strongly upon the other jurors that a verdict of conviction should be returned therein. [Duly verified.] J. F. HARVEY."

N. Hamlin is the person whose name is alleged in the indictment to have been forged.

There is no claim that the prosecution was in any way responsible for the conduct of Slater or Eagan, and there is no error in the refusal of the court to grant a new trial because of it. Harvey took no part in the conversation, nor does it appear that he ever believed what was said. It will not do to set aside verdicts merely because jurors, during a trial, obtain information as to the character of litigants, or those standing in the relation of litigants, without the fault of the parties, unless there are reasons to believe that because of such information the trial has been unfair. In such matters the trial court is necessarily invested

with a large discretion. Its opportunity to know or to properly determine a question of prejudice is better than ours can be. This advantage on the part of the district court is inherent in its situation and surroundings. Prejudice is not to be presumed at all times because of misconduct. *State v. Woodson*, 41 Iowa, 425. Just when it will or will not be presumed can not be definitely determined. Conceding all that should be claimed as to people being unconsciously influenced by words or acts of others, and the situation is not changed. In some cases the law will assume prejudice, and in others not. Of the many cases cited where verdicts have been set aside, none are like this in all essential particulars. Although it is a civil case, we think the rule announced in *McCash v. City of Burlington*, 72 Iowa, 26, is controlling as to that point. In line with our conclusion are the following cases: *Martin v. People*, 54 Ill. 225; *McKenzie v. State*, 26 Ark. 334; *State v. Fruge*, 28 La. Ann. 657; *Barlow v. State*, 2 Blackf. 114; *Flanegan v. State*, 64 Ga. 53; *Hill v. State, Id.*, 453; 2 Thompson on Trials, section 2553.

In support of the motion for a new trial is the affidavit of one Dickerson, who was an employee in the Cass County bank. He states in his affidavit that the juror Ostrus came into the bank one day and his brother asked Ostrus if court had adjourned, and Ostrus "answered, that it had to give the old man Hamlin a rest, as the attorneys had worried him so." He said "it was an outrage the way they worried him; had questioned him about his affairs from his childhood up, and all through his business life." This, in connection with the affidavit of Harvey as to the efforts of Ostrus to secure a conviction, is urged as misconduct for which a new trial should be granted. While it would be better for jurors to refrain from even such remarks pending a trial, nothing indicates to us that

the efforts of Ostrus to secure a conviction were not the result of his convictions from the evidence. We see nothing in what was said at the bank to indicate that Ostrus favored either side at the time of the remark. One whose sympathy was with the defense might have been alike impressed by the course pursued in the examination. It is true the examination might have had its influence upon his mind, and possibly have induced a prejudice, as is likely many times the case. The methods and character of examinations of witnesses are proper matters for jurors to observe and consider in weighing the testimony adduced, and they undoubtedly attached much importance, in their deliberations, to the fact of whether the examination was fair or unfair to the witness, and, with proper limitations, it is right that they should. We are not to be understood as impliedly holding that the verdict could be impeached by the affidavit of Harvey as to the conduct of Ostrus during the deliberations of the jury. Our considerations have been induced by the showing of what occurred at the bank.

II. Sam Eagan was called by the plaintiff in rebuttal, and it is urged that the testimony sought was not properly rebutting. Quite a number of questions were asked of the witness, the answers to a part of which were excluded by the court. As to some of the questions, the objections were overruled. The questions were as to conversations with the defendant, with a view to prove his statements in certain particulars, and the result was that the witness failed to testify to the facts, and the answers were of no importance in the case, and could have no influence with the jury against the defendant. We need not consider the correctness of the rulings.

There is a claim that the verdict is not supported by sufficient evidence, but to our minds it has full support. The judgment is **AFFIRMED**.

2. EVIDENCE:  
error without  
prejudice.

THE STATE OF IOWA, Appellee, v. A. E. KIDD,  
Appellant.

1. **Evidence: OPINION: LEADING QUESTIONS.** On the trial of an indictment for forgery in altering certain special findings in a civil action, in which the defendant herein was plaintiff, the clerk of the court having testified that he kept the findings behind a pile of blanks in a particular case, was asked: "Could anyone see them there, on looking at the case, without reaching around behind the blanks?" *held*, that the question called for a fact, and not for an opinion, and that it was not objectionable as leading.
2. ———: **COMPETENCY: MATERIALITY.** In such case, where it had been shown that the findings had been in the office of the defendant's attorney for a time, and that the defendant was there a part of that time, and had the findings in his hands one or more times, *held*, that a question to his attorney as to whether, during that time, he had been in the habit of watching what the defendant did, was neither incompetent nor immaterial.
3. ———: ———: **ERROR WITHOUT PREJUDICE.** The defendant's attorney having testified that the defendant was in full view the second time he was in his office, he was asked: "Did he make those erasures, or any of them, during that time—the second time?" *held*, that the question called for a fact and not an opinion, and that it was error to sustain an objection to it, made by the state, on the ground of incompetency and immateriality; but that the error was without prejudice to the defendant, as the witness was afterwards permitted to state all that the question called for.
4. **Criminal Law: WITNESS NOT BEFORE GRAND JURY: EXAMINATION ON MOTION: ELECTION AND WAIVER BY DEFENDANT.** When the prosecuting attorney has obtained leave, upon motion under section 4421 of the Code, to examine a witness who was not before the grand jury, and of whose evidence he has not given four days' notice, the defendant is entitled to elect whether he will take a continuance or go on with the trial, and where his counsel announces to the court: "Saving our exceptions to the rulings of the court, we will go on with the trial," he can not have the ruling reviewed upon appeal.
5. **Evidence: PRIVILEGED COMMUNICATIONS: ATTORNEY AND CLIENT.** Upon the trial of an indictment for forgery in altering the special findings in a civil action, it appeared that the defendant had sent to his attorney in a civil case a copy of the findings for a proper purpose; that he afterwards wrote to such attorney, requesting him to return the copy to him, to be shown to another person named; that the copy was returned accordingly, and that it was afterwards sent

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98	734
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121	519
89	54
1143	231
1143	272

back to the attorney, altered to correspond with the alterations in the original; and the attorney was required to testify to these matters, and to produce the documents, against his protest and the objection of the defendant that they were privileged communications. *Held*, that there being nothing in the defendant's letter of a confidential nature, it was not a privileged communication; that the special findings were part of the public records, and that, therefore, a true copy of them was not a privileged communication; and that, while the altered copy might be regarded as a confidential communication, it was not privileged, since the evident intent thereof was to deceive, not only the attorney, but the court also, and the rule is that professional communications are not privileged, when they are for an unlawful purpose, having for their object the commission of a crime.

6. **Forgery: INTENT TO DEFRAUD: INSTRUCTIONS TO JURY.** Upon the trial of an indictment for forgery in altering the special findings of the jury in a civil action, the defendant asked an instruction based upon the theory that there was no evidence of the existence of any person, partnership or corporation capable of being defrauded by the changes, but the evidence showed, beyond question, that the defendant was the plaintiff in the civil action, and that the alterations were intended to defraud the defendant in that action, and that that action had been begun and prosecuted to judgment against the defendant therein as a corporation. *Held*, that the defendant herein was estopped to question the corporate capacity of the opposite party in that action, and that the instruction was properly refused.
7. —: **DEGREES OF OFFENSE: ALTERING WRITTEN INSTRUMENT.** The altering of a written instrument, so as to make it a different instrument, is the making of a new instrument, under section 3917 of the Code, defining the highest degree of forgery, and not the obliteration of an instrument, under section 3929, defining a lower degree of forgery.
8. **Trial in Criminal Cases: REFERENCE TO DEFENDANT'S FAILURE TO TESTIFY.** Where the defendant's attorney, in his opening remarks to the jury, on a trial for forgery, stated that, if the case went so far that the defendant's evidence would be introduced, they would show who the guilty parties were; and the prosecuting attorney, referring thereto in his closing argument, said, in substance: "If the defendant or his attorney knew who the guilty party was, why did they not come on and prove it? The fact that they did not do so shows guilt;" *held*, that these last remarks were not a violation of the statute which forbids the state to refer in argument to the fact that the defendant has failed to testify in his own behalf.

*Appeal from Clay District Court.*—HON. LOT THOMAS,  
Judge.

FRIDAY, OCTOBER 6, 1893.

THE defendant was indicted, tried, and convicted of the crime of forgery; and judgment that he be committed to the penitentiary for a term of three months, and that he pay costs, was entered against him. From this judgment, he appeals.—*Affirmed.*

*C. A. Irwin and A. W. Swett*, for appellant.

*John Y. Stone*, Attorney General, *Thos. A. Cheshire*, and *A. C. Parker*, for the State.

GIVEN, J.—The following is a sufficient statement of the facts for an understanding of the questions presented: The forgery charged is the altering of the sixth, seventh, twelfth and fifteenth special findings returned by the jury in a case wherein this defendant was plaintiff, and the American Pill & Medicine Company of Spencer, Iowa, was defendant. In that action this defendant sought to recover for services under an alleged contract of employment for a specified time, and damages for discharging him without cause before the expiration of the time. The defendant therein answered that the plaintiff, Kidd, without the knowledge of the defendant company, had induced it to enter into an illegal business, and, as manager of said corporation, he was conducting an illegal business; that he was incompetent, and discharged for said reasons. The plaintiff, Kidd, replied, denying these allegations. The sixth, seventh, twelfth and fifteenth special findings, as returned by the jury, were as follows:

“6. Was the defendant’s business conducted as an illegal business? Yes.

“7. Was the defendant’s business conducted in an illegal manner? Yes, in part.

“12. Was plaintiff incompetent in his management of the defendant’s business? Yes.

"15. Do you find that De Luc's pills, as advertised and sold, were so advertised and sold for an illegal purpose? In part, they were."

The alterations charged, are, erasing the letters "n" and "il" from the words "an" and "illegal," in the sixth, seventh and fifteenth special findings, and the letters "in" from the word "incompetent," in the twelfth special finding. The evidence shows, without conflict, that on January 28, 1892, Mr. Steele, one of the attorneys for the plaintiff in the civil action, got the papers in that case, including the special findings, from the clerk, for the purpose of being used in submitting a motion for a new trial theretofore filed. Mr. Steele took them to his office, where they were kept during the day; the defendant Kidd being present part of the time, and having the papers in his hands one or more times. That evening, Mr. Steele, upon reading the special findings, discovered the alterations alleged. The evidence tends to show that the alterations had not been made at the time Mr. Steele took the papers to his office, and it is claimed, from the testimony of Mr. Steele and others present, that the defendant could not have made the alterations without being seen, and that he was not seen to have done so. The claim on behalf of the state is that the defendant did have opportunities on that day to make the alterations without being seen; that he did make them; and that to prevent discovery, he wrote to his attorneys, to whom he had furnished correct copies of the findings, to return the copies to him, giving a false reason for so requesting, the true reason being that he might make the copies correspond with the findings as altered. We first notice the appellant's complaints against certain rulings of the court in admitting and rejecting testimony.

I. The clerk, having testified that he kept the special findings behind a pile of blanks in a particular

- case, was asked, "Could anyone see them there, on looking at the case, without reaching around behind the blanks?"
1. EVIDENCE: opinion: leading questions.

Defendant objected as calling for an opinion, and leading. The cases cited in relation to opinions by experts are not in point. It did not require special skill or learning to answer this question. It called for a fact, and was not objectionably leading.

II. Mr. Steele, having testified to the defendant's being in his office on the twenty-eighth day of January, and several times on the days previous,

2. —: competency: materiality.

was asked, "During this time, were you in the habit of watching to see what he did?" The defendant's objection, as incompetent and immaterial, was properly overruled. In view of the claims of the parties, it was very material to know how closely Mr. Steele observed the actions of the defendant while in that office on the twenty-eighth of January, and Mr. Steele was surely a competent witness by whom to prove the fact.

III. Mr. Steele was asked by the defendant, "Well, during the second time that he was there, did he make these alterations?" The plaintiff

3. —: —: error without prejudice.

objected as incompetent and immaterial.

The objection was sustained, "so far as he has testified that he was not in his sight." Mr. Steele then stated that the defendant was in his view the entire second time that he was in the office. He was then asked, "Did he make those erasures, or any of them, during that time, the second time?" The plaintiff objected as above, and the objection was sustained. The objection should have been overruled. If the defendant was in view of the witness all the time, so that he must have seen him alter the papers, if he did so, then the question called for a fact, and not an opinion. The ruling was without prejudice, however, as Mr. Steele afterwards stated, without objection, that the defendant

was where he could observe him all the time, and that he did not see him make any alterations in the papers, and that he did not see him have pen or pencil, using it on the papers, and that he would have seen it had he done so.

The defendant offered in evidence a letter, exhibit 5, from his attorney, Mr. Morling, to him, to which the plaintiff objected as irrelevant and immaterial. The objection was sustained as to a part of the letter. The parts excluded are clearly irrelevant and immaterial.

IV. The county attorney caused notice to be served, in due time, that the state would examine George E. Clark, Esq., as a witness. By inadvertence, his residence was stated to be Spencer, instead of Algona; and when the witness was called, and stated that his residence was Algona, the defendant objected to his being examined, upon the ground that no sufficient notice had been given. The objection was sustained, and thereupon the county attorney filed a motion and affidavit for leave to introduce the evidence of Mr. Clark. The defendant objected to the motion upon several grounds, among which are these: That the county attorney learned that said evidence could be obtained in time to have given four days' notice of its introduction, and that there was no showing of diligence. The application was sustained, "and leave granted to the defendant, of course, to take a continuance of the case, under the statute, or permit the witness to testify." Counsel for the defendant thereupon announced that, "saving our exceptions to the rulings of the court, we will go on with the trial," and thereupon Mr. Clark was examined.

Section 4421 of the Code, after limiting the county attorney to witnesses examined before the grand jury, a minute of whose testimony is returned with the

4. CRIMINAL LAW:  
witness not  
before grand  
jury: exami-  
nation on mo-  
tion: election  
and waiver by  
defendant.

indictment, and to those for whose examination he had given four days' notice, provides as follows: "Provided, that whenever the district attorney desires to introduce evidence to support the indictment, of which he shall not have given four days' notice, because of insufficient time therefor since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the name, place of residence, and occupation of the witnesses he desires to introduce, and the substance of what he expects to prove by said witnesses, and showing diligence such as is required in a motion for a continuance supported by affidavit, whereupon, if the court sustain said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify; and if said defendant shall not elect to have said cause continued, the district attorney may examine said witnesses in the same manner, and with the same effect, as though four days' notice thereof had been given defendant as hereinbefore provided, except that the district attorney, in the examination of said witnesses, shall be strictly confined to the matters set out in his motion."

The evident purpose of these provisions is to inform the defendant in time to enable him to prepare to defend against the same, and of the witnesses and evidence by which he will be confronted. If he permits a witness to be examined without objection who was not before the grand jury, and for whose examination no notice was given or leave granted, he should not be heard to complain, for, by failing to object, he waived his right to notice and to time. When a motion for leave to examine a witness is filed, the defendant has the notice contemplated, and when the leave is granted he has the election to take time or not. It is his privilege to elect to have the cause continued, thereby insuring to himself time to prepare to meet the

proposed evidence. If he does not elect to take a continuance, he certainly should be held to have waived the time. The situation is not unlike what it would be if less than four days' notice had been given, and the defendant had failed to object to the examination of the witness. Whether the motion for leave is rightfully or wrongfully sustained, the only right given to the defendant is the election to continue the case.

V. The state was permitted, over the defendant's objections, and the protests of the witnesses, to examine E. A. Morling, Esq., and George E.

6. EVIDENCE:  
privileged  
communications:  
attorney  
and client.

Clark, Esq., and to require them to produce certain documents which the state introduced in evidence. The ground of the objections and protests was, that the possession of the documents and matters inquired about were privileged. It appears, without dispute, that these gentlemen, with J. E. Steele, Esq., were the attorneys for the defendant in his suit in which the special findings were returned, and that, for the purpose of preparing to submit a motion for a new trial in that case, Mr. Steele, with the knowledge of this defendant, sent to Clark and Morling, each, a copy of the findings, as returned by the jury. Mr. Clark, being required to testify, stated that on or about January 28, 1892, he received a postal card from the defendant, which, in obedience to the ruling of the court, he produced; that, in compliance with the request in the card, he sent his copy of the findings to the defendant; and that in a week or ten days they were returned to him, altered in the particulars as charged in the indictment. Mr. Morling, being required to testify, stated that he received a letter from the defendant, which, in obedience to the ruling of the court, he produced; that, in compliance with the defendant's request, he sent him the copy of the findings. The postal card, stamped "Spencer, 28 P. M., 1892, Iowa," is as follows:

*"Geo. E. Clark, Esq., Algona, Iowa:*

"Please return to me the copy of special findings in my salary suit, that I sent you. J. A. Richardson, former traveler for Pill Co., wants to see the findings, as the Co. owed him \$518.00. Please hunt up and send to me at once.

A. E. KIDD."

The letter to Mr. Morling is dated "Spencer, Iowa, January 28, 1892," and contained the same request and gives the same reason. It does not appear that Mr. Morling's copy was returned to him, but there is evidence tending to show that said copy was also altered in the particulars charged.

The rule as to privileged communications is prescribed in section 3643 of the Code, and, as applied to a practicing attorney is as follows: That he shall not "be allowed in giving testimony to disclose any confidential communication properly entrusted to him in his professional capacity; and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice," unless his client waives the privilege. Writings, when confided to an attorney, when within the rule, are privileged, the same as verbal communications. Communications, to be privileged, must be confidential; that is, "communicated in confidence; privately intrusted, secret; in reliance on secrecy." Webster. The special findings, as returned by the jury, were a matter of public record, and, therefore, sending a copy thereof to the attorney was not a confidential communication, as it imparted no information that was not open to the world. The postal card and letter do not indicate upon their face that the request to return the copies was made in expectation that it would be kept secret. No one would think of charging Mr. Morling or Mr. Clark with violating professional confidence, had they told that they had received the copies of the findings, and the written request to return them, to be shown to another person.

They knew of no other reason for the request than that stated, and there is an entire absence of the elements of a confidential communication in the transaction.

The state claims that the true reason for desiring the return of the copies was that they might be changed to correspond with the original as altered. Had the defendant stated such to be his reason for desiring the return of the copies, we might hold that the communication was confidential. We are of the opinion, that the copies of the findings, as returned by the jury, and the written requests that they be returned, were not confidential communications, and, therefore, not privileged. Mr. Clark's copy was returned to him, changed to correspond with the original as altered. It may be conceded that this was a confidential communication, but it is not every confidential communication that is privileged. It was neither proper nor necessary to place a false copy of the findings, as returned by the jury in the hands of Mr. Clark, to enable him to discharge his duties as attorney for this defendant in his civil action. He was not informed that the copy was false. The evident intent was to deceive him, as well as the court, with respect to these findings: "Professional communications are not privileged, when such communications are for an unlawful purpose, having for their object the commission of a crime." 19 Am. and Eng. Encyclopedia of Law, 140, and cases cited. That the findings were altered as charged, and that Mr. Clark's copy was returned to him with the same alterations, there is no question. We are clearly of the opinion that the altered copy was not privileged.

When about to submit the motion for a new trial, Mr. Morling discovered the alterations in the findings, and had some conversation with the defendant in relation thereto. The court held, that what was said as to the effect of the change upon the civil action and the motion for a new trial was privileged, but what was

said as to when or how the changes were made, was not. Under this ruling, Mr. Morling testified that nothing was said as to whether the findings had been changed, as to who had changed them, or the circumstances under which they were changed; that he said to defendant that, in view of the situation, they would probably get up some scheme to lay it on him; and that he said he had nothing to do with it. Even if the ruling was erroneous, it was without prejudice to the defendant, as the testimony is in no sense against him.

VI. The court instructed that, to convict, the jury must find that the defendant made the alterations substantially as charged, and that they were made with intent to defraud. The

6. FORGERY: In-  
tent to de-  
fraud: Instruc-  
tions to jury.

appellant asked an instruction to the effect that, the state must prove "both an intent to defraud some person, and that there was some person, partnership or corporation that could have been defrauded." He complains of the refusal to give this instruction, and contends that the evidence fails to show the existence of any person, partnership or corporation capable of being defrauded by the changes. Under section 4313, "it is sufficient if there appear to be an intent to defraud the United States or any state, county, city or township, or any body corporate, or any officer in his official capacity, or any copartnership or any member thereof, or any particular person." That the person who altered the special findings intended to defraud the defendant in that action, admits of no doubt. There was no other motive discernible for committing the forgery. It is argued that there is no evidence that the American Pill & Medicine Company was either a body corporate or a copartnership. While there is no direct evidence of the character of this company, we have the fact that this defendant brought his action against it upon a contract of employment made with it; that the company answered as a

corporation, and the defendant prosecuted his action to a trial and verdict without any question that the company was not so organized as to be liable to be sued. It is too late, in the face of this record, for the defendant to complain that the American Pill & Medicine Company is not capable of being defrauded.

The appellant also complains of the sixth paragraph of the charge, "because he therein submitted to the jury the question whether or not the alleged changes were material, and whether they caused the findings to appear as having been decided more favorably to the defendant than they in fact were." The court properly instructed that the findings were upon material issues in that case, and, as bearing upon the question of intent, left it to the jury to say whether the alterations made the case appear to have been decided more favorably to this defendant than it was in fact decided. In view of the other special findings, this question was properly left with the jury, even if, under different facts, it would be otherwise.

VII. The appellant contends that the crime of fraudulent obliteration of instruments in writing as defined in section 3929 of the Code, is a lower degree of the crime of forgery, as defined in section 3917, and charged in the indictment, and complains that the jury were not instructed as to the lower degree. Section 3917 defines as a crime the falsely making, altering, forging or counterfeiting of any of the instruments named, with intent to defraud. Section 3929 provides that the total or partial erasure or obliteration of said instrument, with intent to defraud, shall be deemed forgery. The crimes are different and distinct; the latter consisting in the partial or total destruction of the instrument, while the former consists in making the instrument. The making may be by producing a new instrument, or by altering one in existence so as to make it

7. —: degrees  
of offense: al-  
tering written  
instrument.

a different instrument. The one crime consists in making with intent to defraud; the other, in destroying.

VIII. The appellant contends that his motion for a new trial should have been sustained, on the grounds that the evidence failed to show that he made the alterations charged, and because of misconduct of the county attorney.

The evidence as to the appellant's opportunities to make the alterations at Mr. Steele's office on the twenty-eighth of January is conflicting. It is entirely clear that neither Mr. Steele, nor any of the witnesses there present, saw the defendant make the alterations. It is questionable, under their evidence, whether he could not have done so without being seen by them. It is not required that we set out or discuss the evidence. It is sufficient to say that the verdict has such support that it should not be disturbed on this ground.

The county attorney, in the closing argument, said, in substance, that, if the defendant or his attorney knew who the guilty party was, why did they not come on and prove it? The fact that they did not do so shows guilt.

If a person knows who the guilty party is, and does not attempt to prove it, in a case of this kind, he is guilty of criminal negligence. This language seems to have been called out by the remarks of defendant's attorney in stating the case to the jury, to the effect that, if the case went so far as that the defendant's evidence would be introduced, they would show who the guilty parties were. The remarks of the county attorney did not mention the fact, that the defendant had not testified in his own behalf, and were in reply to what the defendant's attorney had said, and would not be understood as having any reference thereto.

The case has been presented with marked care and ability, nothing being omitted that might be said on

S. TRIAL IN CRIMINAL CASES: REFERENCE TO DEFENDANT'S FAILURE TO TESTIFY.

behalf of the appellant. We have considered the record with care, and reach the conclusion that the judgment of the district court should be AFFIRMED.

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THE STATE OF IOWA, Appellee, v. WM. STOMMEL,  
Defendant; H. M. VAN VLIET *et al.*, Sure-  
ties, Appellants.

**Criminal Law:** BAIL UPON APPEAL: SURRENDER OF DEFENDANT IN EXONERATION. Sections 4593 to 4595 of the Code, providing for the surrender of the defendant in exoneration of bail, relate only to bail given on appeal from a judgment of imprisonment, and not to bail upon an appeal from a judgment imposing a fine only; and in the latter case the sureties upon the appeal bond can not surrender the defendant in their own exoneration, but must pay according to the terms of their bond.

*Appeal from Mahaska District Court.*—HON. A. R. DEWEY, Judge.

FRIDAY, OCTOBER 6, 1893.

THIS appeal is by H. M. Van Vliet and Robert Milner, sureties for the defendant on his appeal to this court, from an order overruling their motion to be released and exonerated as such sureties, because of having surrendered the defendant to the custody of the sheriff, as provided in section 4593 of the Code. *Affirmed.*

*Liston McMillen*, for appellants.

*Byron W. Preston*, for the State.

GIVEN, J.—The judgment from which Stommel appealed was that he pay a fine of six hundred dollars. Section 4587 of the Code provides: “After conviction, upon an appeal to the supreme court the defendant must be admitted to bail as follows: If the appeal be from a judgment imposing a fine, upon the undertaking of bail that he will pay the same, or such part of it as

the supreme court may direct, and in all respects abide the orders and the judgment of the supreme court upon the appeal." Said section further provides the condition of the undertaking on an appeal from a judgment of imprisonment. The undertaking of bail in this case is conditioned as follows: "Now, if the said appellant, Wm. Stommel, shall pay to the state of Iowa all costs and damages that shall be adjudged against said Wm. Stommel on said appeal, and shall also pay and satisfy fully the amount of the said judgment and costs or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render or order to be rendered by the district court, then this obligation to be void; otherwise to remain in full force and virtue."

The appeal was clearly taken under the subdivision of section 4587 quoted above. The contention is whether the provisions of sections 4593-4595 of the Code apply to an undertaking of bail on appeal from a judgment for a fine only. Sections 4593 and 4594 provide the manner in which the bail may surrender the defendant in their exoneration "to the officer to whose custody he may be committed at the time of giving bail," and section 4595 provides that the defendant may surrender himself "to the officer to whom the commitment was made or directed," when money has been deposited instead of bail. These provisions clearly relate to bail given on appeal from a judgment of imprisonment, and not to bail upon an appeal from a judgment imposing a fine only. If the judgment be for the payment of money only, the defendant is not subject to imprisonment under it; yet if we hold as claimed by appellant, they may subject him to imprisonment without any judgment of imprisonment having been pronounced against him. We think the motion of appellants to be released and exonerated was properly overruled. **AFFIRMED.**

FRANKLIN SUGAR REFINING Co., Appellant, v. COLLIER,  
ROBERTSON & HAMBLETON *et al.*, Appellees.

1. **Sale: RESCISSION FOR FRAUD: EVIDENCE.** In an action to rescind a sale, and recover the goods, on the alleged ground that the purchasers procured them by false representations as to their financial condition, *held*, that a question asked the vendor's agent, through whom the goods were sold, as to what effect it would have had upon his dealings with the purchasers had they told him of their indebtedness, was properly excluded as irrelevant.
2. ———: **ACKNOWLEDGMENT: NOTICE.** The acknowledgment of a bill of sale is immaterial as between the parties thereto, and as to such other persons as have actual notice of the sale; and possession of the goods by the purchaser named in the bill is actual notice to all the world of his interest in the property.
3. ———: **RESCISSION FOR FRAUD: EVIDENCE.** The fact that an insolvent orders goods on credit is not fraudulent, unless coupled with an intent not to pay for them, or unless the natural and probable, if not necessary, result of his act is to defraud the seller. And in this action to rescind a sale of sugar, and to recover the goods, upon the ground of fraudulent representations, where the evidence showed that the buyers were much in debt at the time, but failed to show that they were insolvent, or that the purchase was made with any fraudulent intent, or by means of fraudulent representations, except the statement that they were now through with their canning business, and would thereafter have plenty of money, and discount their bills promptly, *held*, that the court properly directed a verdict for the defendant.

*Appeal from Lee District Court.*—HON. J. M. CASEY,  
Judge.

FRIDAY, OCTOBER 6, 1893.

ACTION for the recovery of specific personal property. A verdict was returned for the defendants by direction of the court, upon which a judgment was rendered. The plaintiff appeals.—*Affirmed.*

*Craig, McCrary & Craig*, for appellant.

*F. T. Hughes and James C. Davis*, for appellees.

ROBINSON, C. J.—The plaintiff is a sugar refining company engaged in doing business in the city of Philadelphia, and Collier, Robertson & Hambleton were, in the year 1890, engaged in the grocery business in the city of Keokuk, in this state. In the months of October and November of the year specified, Collier, Robertson & Hambleton ordered of plaintiff sugar to the value of five thousand, eight hundred and twenty dollars and seventeen cents, which was shipped to them, the last order having been filled on the twentieth day of November of that year. On the twelfth day of the next month this action was commenced to recover the sugar so shipped, and as a cause of action the plaintiff alleges that, when the sugar was ordered, Collier, Robertson & Hambleton were insolvent, and in a failing condition; that they were unable to pay for the sugar ordered, and well knew their condition; and that the sugar was procured by them by means of false representations in regard to their financial condition. The plaintiff demands judgment for the possession, and right of possession, of the property. After the sugar was shipped to, and received by, the consignees, they executed to their codefendant, J. F. Smith, as trustee, conveyances of the sugar so shipped, and other property, for the purpose of securing the payment of certain debts specified in the instruments of conveyance. Smith accepted the trust, and took possession of the property. After that was done, this action was commenced. An order for the return to the plaintiff of the property in controversy was issued, and, by virtue of it, sugar of the value of nine hundred and eighteen dollars and eighty-two cents, was taken from Smith, and returned to the plaintiff. He claims the property so returned by virtue of the conveyance thereof to him,

and demands judgment for its value. Judgment was rendered in his favor for the value stated, and interest.

I. The person who received the orders in question was a merchandise broker, of Keokuk, named Root.

He had been notified by the plaintiff that Collier, Robertson & Hambleton were not to receive a credit of more than five thousand dollars, and that they were owing the plaintiff six thousand, six hundred and eighty seven dollars and forty-nine cents. About the time the first of the orders in question was given, Root called on Collier and Robertson, of Collier, Robertson & Hambleton at their place of business, and was told by them that they had permitted their sugar bills to run behind on account of the canning business in which they were interested, and which required considerable money; that they were through with the canning season, and would have plenty of money, and would discount their bills promptly. At the same time, they showed Root a draft for the amount they were owing the plaintiff, which they were about to send to it, and which, as we understand the record, was received by the plaintiff. Relying on the statement so made, Root sold the sugar in controversy.

It appears that at the time the conveyances to Smith were executed, two days before this action was commenced, Collier, Robertson & Hambleton were indebted to different persons in amounts which aggregated more than one hundred and eighty thousand dollars. Root testified as a witness, and was asked the following question: "Did they say anything about their owing one hundred and eighty thousand dollars?" But an objection to the question was sustained, and that ruling is alleged to have been erroneous. If erroneous, it was without prejudice, for the reason that the witness afterward testified that Collier, Robertson & Hambleton did not say anything as to how much they owed. Root

1. SALE: rescission for fraud: evidence

was also asked the following: "What effect would it have had on your dealing with them, as the agent of the Franklin Sugar-Refining Company, had they told you of the indebtedness to the bank and the individuals here in Keokuk?" An objection to the question was sustained, and of that the appellant complains. We think the ruling was correct. It is not alleged in the petition that Collier, Robertson & Hambleton fraudulently or wrongfully suppressed knowledge of their actual condition, but that they procured the sugar "under false representations of their financial condition." The answer sought was not relevant to any issue presented by the pleadings.

II. The pleadings allege that Smith holds the property by virtue of an instrument of conveyance.

2. —: acknowl-  
edgment:  
notice.      There appears to have been two, of a similar character, and the plaintiff assails them as being invalid because of defective acknowledgments. Whether the acknowledgments were defective, we need not determine. The instruments appear to have been authorized or ratified by Collier, Robertson & Hambleton, and they not only do not contest them in any manner, but allege a sale and transfer of all their property to Smith prior to the seizure of that in controversy at the suit of the plaintiff, and he had actual possession of it when this action was commenced. The validity of the instruments, as between the parties to them, and as to all persons having actual notice of them, did not depend upon the acknowledgments. Smith's possession was notice to the plaintiff of his interest in the property, and, for the purposes of this case it is immaterial whether the instruments were duly acknowledged and recorded or not.

III. It is said the district court erred in directing a verdict. The evidence fails to show that Collier, Robertson & Hambleton were insolvent when the merchandise in question was ordered. It is true that, at about the time

8. —: rescission  
for fraud:  
evidence.

this action was commenced, they were indebted in a large amount, as we have stated, but the value of their assets was also large. If it be conceded that the jury might have found that they were, in fact, insolvent when the sugar in question was ordered, it does not follow that the jury might properly have found that the plaintiff was entitled to recover. The fact that an insolvent orders goods on credit is not fraudulent, unless coupled with an intent not to pay for them, or unless the natural and probable, if not necessary, result of his act is to defraud the seller. *Nichols v. Pinner*, 18 N. Y. 299; *Thompson v. Peck*, 18 N. E. Rep. (Ind.) 17; *Kelsey v. Harrison*, 29 Kan. 145; *Bidault v. Wales*, 19 Mo. 37; Cooley, Torts, 478. In *Houghtaling v. Hills*, 59 Iowa, 287, this court held, in effect, that a purchase made by an insolvent, who failed to disclose his insolvency, when, if he had done so, the sale would not have been made, was not fraudulent, and that it was the making of a purchase with the intent on the part of the purchaser to take advantage of his insolvency, and not pay for the property so obtained, which enabled the seller to avoid the sale. In this case, it is not shown that the purchase was made with any fraudulent intent, nor by means of fraudulent representations. It does not appear to have been the duty of Collier, Robertson & Hambleton to disclose their financial condition. No relation of trust or confidence existed between them and the plaintiff. In *Dambmann v. Schulting*, 75 N. Y. 61, it was said: "The general rule is that a party engaged in a business transaction with another can commit a legal fraud only by fraudulent misrepresentation of facts, or by such conduct or such artifice, for a fraudulent purpose, as will mislead the other party, or throw him off from his guard, and thus cause him to omit inquiry or examination which he would otherwise make. A party buying or selling property or executing instruments must, by inquiry or

examination, gain all the knowledge he desires. He can not proceed blindly, omitting all inquiry and examination, and then complain that the other party did not volunteer all the information he had." See, also, *Graham v. Meyer*, 99 N. Y. 611, 1 N. E. Rep. 143; *Cleveland v. Richardson*, 132 U. S. 318, 10 Sup. Ct. Rep. 100; *Talcott v. Henderson*, 31 Ohio St. 162. The plaintiff made no inquiry of Collier, Robertson & Hambleton before selling them the sugar. Their statement that they were through with the canning season, and would have plenty of money, and would discount their bills promptly, so far as it related to their financial ability, was an expression of an opinion in regard to a future event, and, so far as is shown, was made in good faith. We conclude that the evidence submitted did not authorize a verdict for plaintiff, and that the court did not err in directing a verdict. *Meyer v. Houck*, 85 Iowa, 319.

The judgment of the district court is **AFFIRMED**.

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**MARY C. BANNING, Administratrix, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.**

**1. Railroads: INJURY AT CROSSING: DUTY TO LISTEN FOR TRAINS.**

When one is about to cross a railroad track, and knows that there are obstacles which may prevent his seeing an approaching train, and there is nothing to prevent his stopping and listening, and his attention is in no way diverted by surrounding circumstances from listening, and it appears that, if he had listened, the injury which he received by a collision with a moving car would have been avoided, the failure to listen constitutes such negligence as will defeat a recovery for the injury.

**2. ———: ———: VIEW OF PREMISES BY JURY: DISCRETION OF COURT.**

In an action for the death of the plaintiff's intestate upon a railroad crossing, the court permitted the jury to view the scene of the accident; to which the defendant objected, on the ground that the premises might have been changed in the meantime. *Held*, that in the absence of evidence to the contrary, it must be presumed that the

89 74

92 37

89 74

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situation remained unchanged, and that permitting a view in such cases is a matter so much within the discretion of the trial court that this court can not interfere, where no abuse of that discretion is shown.

3. ———: ———: WARNING OF DANGER: SPECIAL INTERROGATORY. In such case, where the evidence showed that, as the plaintiff's intestate was approaching the crossing, some one remarked, "You had better hold up; the train is coming," it was error for the court to submit to the jury the question, whether the deceased had reason to believe that the remark was addressed to parties other than himself, as the only material question was whether he heard it.
4. ———: ———: CONTRIBUTORY NEGLIGENCE. An instruction that the plaintiff could not recover if the deceased, by his negligence, "substantially" or "materially" contributed to the injury, *held*, to be erroneous, the true rule being that, if the injured party contributes in any way, or in any degree, directly to the injury, there can be no recovery.
5. ———: ———: ELEMENTS OF NEGLIGENCE: CONTRADICTORY INSTRUCTIONS. After the court had, in one instruction, taken from the jury certain elements of negligence as charged in the petition, it was error, in other instructions, to tell the jury that the plaintiff could recover if she showed that the death of her intestate was the result of one or more of the acts of negligence charged in the petition.
6. ———: ———: INSTRUCTION WITHOUT EVIDENCE: COMPARATIVE NEGLIGENCE. An instruction intended to cover a case where the defendant is negligent after being aware of the negligence of the injured party, *held*, erroneous, because there was no evidence on which to base it, and because it was so worded as to lead the jury into an inquiry as to the comparative negligence of the defendant and the deceased; the doctrine of comparative negligence not being recognized in this state.

*Appeal from Audubon District Court.*—WALTER I. SMITH, Judge.

FRIDAY, OCTOBER 6, 1893.

ACTION against the defendant for damages for a personal injury to J. E. Banning, which resulted in his death. From a verdict and judgment for plaintiff the defendant appeals.—*Reversed*.

*Nash, Phelps & Green and Wright & Baldwin*, for appellant.

*Theo. F. Myers and F. E. Brainard*, for appellee.

KINNE, J.—The plaintiff's intestate, J. E. Banning, a man fifty-three years old, was on December 4, 1890, injured by a car of the defendant, which was being kicked along and upon its side track at Audubon, Iowa. He died on the eighth of said month. The defendant's depot in said town is situated at the end of Broadway street. At the east side of the defendant's right of way, and running past the end of said street, there is a side track of the defendant. There is a sidewalk on the south side of said street leading to the defendant's depot, which crosses the side track before mentioned, and it was at this crossing that the accident occurred. It appears also that this is the only walk from the town which extends to the depot. There are a warehouse and some coal sheds south of said walk, and adjacent to said side track, which obstruct the view of one approaching the depot on said sidewalk as to trains of the defendant south of said crossing and depot, which can only be seen after passing said buildings. It appears that the train was to leave at ten o'clock A. M. The plaintiff's intestate was going to the depot for the purpose of taking passage thereon. At about a half hour prior to the time for departure of the train on December 4, 1890, the plaintiff's intestate went west on the sidewalk toward the depot. He was running, or, as some of the witnesses say, was on a "dog trot." As he approached said track, a freight car of the defendant, which had been detached from the train, was being kicked along, and upon said side track, and was crossing at the foot of Broadway and of the sidewalk, when the plaintiff's intestate arrived at the same point. He ran against the car, and was knocked down, and dragged for some distance.

The particular acts of negligence charged against the defendant are: *First*, the constructing of its side

track so near the warehouse and sheds; *second*, that the switch track was sunk where it crossed the street, so as to leave a ridge of dirt about a foot high on the east side of it; *third*, failure to keep a flagman or watchman at the place where the side track crossed the sidewalk; *fourth*, that no brakeman was on the detached car; *fifth*, that the train which was propelling the car was running at a negligent rate of speed.

It appeared that the deceased was a farmer and carpenter; that he was not familiar with the depot grounds of the defendant, though he had come to Audubon on the train, and hence must have had some knowledge as to the defendant's tracks and grounds; that the sidewalk, on which he was going to the depot when injured, was built and maintained by the defendant, and had been used by the public for more than ten years as a public crossing; that he died as a result of the injury. Damages were claimed in the sum of ten thousand dollars.

The defendant denied generally, and alleged that the injury complained of was caused and contributed to by the deceased. At the conclusion of the testimony the defendant moved the court to direct a verdict for it, which motion was overruled. Over the defendant's objection, the jury was permitted to view the locality of the accident. Certain special interrogatories, asked by both parties, were submitted to the jury.

I. Error is assigned on the refusal of the court to direct a verdict for the defendant. The motion to direct a verdict was based upon the negligence of the deceased, which contributed to the accident, and a failure to establish negligence on the part of the defendant.

1. RAILROADS:  
injury at  
crossing: duty  
to listen for  
trains.

It appears that, when Banning was running towards the depot, he was warned that a train was approaching, but he did not heed the warning. The evidence, without conflict, shows that the whistle was sounded several

times, and the bell rung. He paid no attention to these signals of danger, if he heard them, but kept on until he collided with the moving car. He knew he was approaching a railroad track, always a place of danger, and it was his duty, even in the absence of any special warning, or of the giving of signals of those in charge of the train, to use his sense of hearing as well as of sight. Whether or not he heard the train will never be known. It does not appear that his sense of hearing or seeing was in any way impaired, and, if he had stopped and listened, he would have certainly heard the train, and avoided the accident. The slightest observation would have shown him that his duty to listen was all the more necessary by reason of the obstructions which would prevent him from seeing the train until it had arrived at the street line; yet he took no care to protect himself from danger by stopping and listening, but rushed heedlessly on to his death. Some six men, besides the railroad employees, testified to the blowing of the whistle and ringing of the bell. They all knew a train was near, and some of them were waiting for it to pass when the deceased was approaching the track.

But the signals given by the train were not the only warnings that deceased had. Before he reached the train he was told to hold up; that a train was coming. He looked towards the speaker, made no reply, and continued running towards the track. As others, no more favorably situated than he, heard the signals of the approaching train, it must be presumed that, if he had listened, he also would have heard them. There is no evidence that deceased took any steps, whatever, to ascertain if the train was coming. Even though he was approaching a railroad depot for the purpose of taking passage upon a train, still he was bound to know that it was a place of known danger, and to make reasonable use of his senses of sight and hearing for the

preservation of his person from harm. The jury, in a special finding, say they do not know whether deceased listened or not. It is true that a failure to look and listen will not always defeat a recovery. But where, as in this case, one is about to cross a railroad track, and knows that there are obstacles which may prevent his seeing an approaching train, and there is nothing to prevent his stopping and listening, and his attention is in no way diverted by surrounding circumstances from listening, and it appears that, if he had listened, the injury would have been avoided, the general rule must be held to apply that a failure to listen constitutes such negligence as will defeat a recovery. As supporting this rule, we refer to the following cases: *Lang v. Mining Co.*, 49 Iowa, 469; *Artz v. Chic., R. I. & P. R'y Co.*, 34 Iowa, 153; *Dodge v. Chic., R. I. & P. R'y Co.*, 34 Iowa, 276; *Carlin v. Chic., R. I. & P. R'y Co.*, 37 Iowa, 316; *Payne v. Chic., R. I. & P. R'y Co.*, 39 Iowa, 523; *Haines v. Ill. Cent. R'y Co.*, 41 Iowa, 227; *Benton v. Cent. Iowa. R'y Co.*, 42 Iowa, 192; *Funston v. Cent. Iowa R'y Co.*, 61 Iowa, 452; *Schaefer v. Chic., M. & St. P. R'y Co.*, 62 Iowa, 624; *Griffin v. Chic., R. I. & P. R'y Co.*, 68 Iowa, 638; *Sala v. Chic., R. I. & P. R'y Co.*, 85 Iowa, 678. There is no evidence that the defendant knew, or by the exercise of reasonable care could have known, that the deceased was about to attempt to go upon the track, regardless of the moving car. The motion should have been sustained. The plaintiff had failed to establish an element in her case essential to her recovery, the freedom of the deceased from negligence which contributed to produce the injury. As we have endeavored to show, if the deceased had not been guilty of negligence, this accident would never have happened.

II. It is said that the court erred in permitting the jury to view the scene of the accident. It is insisted

2. —: —: view of premises by jury: discretion of court.      that the premises may have been different when viewed by the jury from what they were when the accident occurred.

The evidence does not sustain the contention. For aught that appears, the premises were in all respects as when the injury resulted. Certainly in the absence of evidence to the contrary, we may well presume that there had been no change. This matter of permitting a view is so much in the discretion of the trial court that we should not be justified in interfering with its action in that respect unless an abuse of that discretion is shown. No such case is made in this record.

III. The fourteenth interrogatory should not have been submitted to the jury. It read: "Did the

3. —: —: warning of danger: special interrogatory.      decedent, J. E. Banning, have reason to believe that the remark of O. Kennels, if any was made, was addressed

to parties other than himself?" The jury answered this, "Yes." The remark referred to was: "You had better hold up, the train is coming." Now, it was entirely immaterial to whom the remark was addressed. The real question is, did the deceased hear the remark. If so, it being a warning of impending danger, he was in duty bound to heed the admonition, as much as if it had been directed to him. The only evidence which can be said to tend to show that the remark was not addressed to the deceased is that of a witness who says, that the thought the remark was addressed to him (the witness), not to the deceased. But, as we have said, it is not material to whom it was made, if the deceased heard it.

IV. The jury were told in the third instruction that defendant would not be liable if the injured party "substantially" contributed to the injury.

4. —: —: contributory negligence.      In the fifth instruction they were told it was incumbent on plaintiff to show that deceased was not guilty of negligence which "mate-

rially" contributed to the accident. The same thought is also found in the eleventh instruction. These instructions are all erroneous. The rule is that, if the injured party contributed in any way, or in any degree directly to the injury, there can be no recovery. *McAunich v. Miss. & Mo. R'y Co.*, 20 Iowa, 338; *Haley v. Chic. & N.W. R'y Co.*, 21 Iowa, 15. Now, the rule given the jury was that the plaintiff's intestate's negligence, in order to defeat recovery, must have materially or substantially contributed to produce the injury; that is, the negligence of the deceased must have contributed "in an important degree" to the injury in order to prevent a recovery. Such is not the law in this state. *Artz v. Chic., R. I. & P. R'y Co.*, 38 Iowa, 296.

V. In the fourth instruction the court takes from the jury, as elements of negligence, the charge of the construction and maintenance of the side track near the warehouse, also the charge as to the bank of earth east of the track; yet afterwards the jury are told that the plaintiff could recover if she showed, by a preponderance of the evidence, that the death of her intestate was the direct or proximate result of one or more acts of negligence charged in the petition. The jury should have been confined to the charges of negligence remaining, after eliminating those mentioned in the fourth instruction.

VI. We do not think the testimony justified the giving of the eighth instruction. It seems to have been intended to cover a case where there was evidence to show that the defendant was negligent after being aware of the negligence of the injured party. There was no evidence tending to establish such a state of facts. The instruction was erroneous in another respect, in that it was so worded as to cause the jury

5. —: —: elements of negligence: contradictory instructions.

6. —: —: instruction without evidence: comparative negligence.

to institute an inquiry as to the comparative negligence of the deceased and the defendant. The doctrine of comparative negligence is not followed in this state; and if the deceased contributed directly, in any degree, or to any extent, in producing the injury, the plaintiff can not recover.

The judgment below must be REVERSED.

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JOHN H. RIEPE, Appellee, v. J. ELTING, Appellant.

1. **Evidence: OBJECTIONS TOO LATE ON APPEAL.** The supreme court will not consider objections to rulings on evidence, when it appears that such objections were not made in the court below.
2. **Highways: USE OF: TURNING TO LEFT IN VIOLATION OF STATUTE: COLLISION: NEGLIGENCE.** Although section 1000 of the Code provides, that persons meeting each other on public highways shall give one half of the same by turning to the right, and that persons violating such provision shall be liable for all damages resulting therefrom, and shall also be liable to a fine, upon the prosecution of the person wronged, yet the fact that one who is traveling on horseback, in the nighttime, turns to the left, when he hears another approaching with a vehicle, is not conclusive evidence of negligence on his part, so as to preclude a recovery for his horse, when killed by a collision with the vehicle.
3. **Instructions: WHEN PROPERLY REFUSED: OBJECTIONS TOO LATE.** Alleged error in giving an instruction can not be considered in this court, where no objection was made to it when given, and the giving of it has not been assigned as error. And it is not error to refuse instructions asked, when, so far as they are correct and applicable, they are substantially embraced in the charge given.
4. **Highways: USE OF: TURNING TO LEFT: COLLISION: NEGLIGENCE: EVIDENCE TO SUPPORT VERDICT.** The plaintiff's two sons were riding the plaintiff's horses toward the west, upon a public highway, in the nighttime, when they heard the defendant approaching them rapidly from the west with a vehicle, but could not see him on account of the darkness. There was a space of about ten feet between the traveled part of the road and the fence on the north, and one of the boys, who was riding a light bay horse, turned to the right into this space, while the other boy, who was riding a black horse, turned to the left, so that he was about ten feet south of the traveled track when his horse was struck and killed by the shaft of the defendant's vehicle, the defendant having turned to his own right when meeting the boys. In an action by the plaintiff to recover the value of the horse, *held*, that,

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103	504
89	82
137	711

in view of all the circumstances, the court properly submitted to the jury the question of the defendant's negligence, and that of the contributory negligence of the boy who rode the horse, and that a verdict for the plaintiff would not be set aside on appeal, as being unsupported by the evidence. ROTHROCK and GRANGER, JJ., *dissenting*.

*Appeal from Des Moines District Court.*—HON. JAMES D. SMYTH, Judge.

SATURDAY, OCTOBER 7, 1893.

ACTION to recover the value of a horse, the death of which is alleged to have been caused by the negligence of the defendant. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed*.

*S. L. Glasgow*, for appellant.

*Seerley & Clark*, for appellee.

ROBINSON, C. J.—The death of the horse was the result of a collision with a horse and a road cart driven by the defendant. In the evening of the twenty-second day of March, 1890, John and Fred Riepe, sons of the plaintiff, left the town of Sperry for their home, riding horses. The road which they traveled led westward, and was crossed at the distance of a half mile by another, called the "Wapello Road." From the place of crossing, the traveled portion of the Sperry road led in a direction north of east, until, at a point about one hundred feet east of the crossing, it was within a few feet of the fence on the north side of the road. The accident occurred south of that point. The young men were walking their horses, John being on the north, and Fred on the south, side of the traveled portion of the road. As they approached the place described, the defendant drove on the Wapello road from the south until he reached the Sperry road, and then turned eastward. It was so dark that objects could be seen but a short

distance away, but John and Fred heard the approaching horse and cart, and turned out of the traveled part of the road to permit them to pass. John, who was riding a horse of a light bay color, turned to the right; while Fred who was riding the horse in controversy, the color of which was black, turned to the left or southward. When his horse was eight or ten feet south of the traveled part of the road, it was struck in the side by a shaft of the cart, receiving an injury, which caused its death the next day. The plaintiff claims that the defendant was driving at a high and reckless rate of speed at the time of the accident, and that the collision was the result of his negligence. The defendant denies that he was negligent, and claims that he was using due care, and driving at a moderate rate of speed, when the accident occurred; that the night was so dark that at first he saw only John and his horse; and that, in endeavoring to avoid them, he turned southward, when a shaft of his cart struck the horse in question, which he then saw for the first time; that he had no reason to look for any one on that side of the road; and that Fred violated a statutory requirement, and was negligent in being there.

I. A witness was asked, concerning the defendant, a question as follows: "What are his habits in regard to being a reckless driver?" The defendant objected to the question as being incompetent, irrelevant, and immaterial.

1. EVIDENCE:  
objections too  
late on appeal.

The objection was overruled, but the question was not answered. The witness was then asked, "Did you know the habits of Mr. Elting in reference to fast and reckless driving prior to March 22, 1880?" and answered without objection, "I can't just say." He was then told to "answer the question," and in response said, "I have seen him drive faster than I would allow a team of mine driven." The witness was then told to "answer the question 'yes' or 'no,'" and stated as follows: "Well, I haven't seen him drive

just reckless. I have seen him drive faster than I would myself, or would allow a team of mine driven. That is as near as I can say." The additional abstract shows that the only objection made to this testimony was that interposed to the first question, and that was not answered. No objection was made to any of the questions answered. If it be conceded that the objection made should be regarded as applying to the second question, it is evident that, if the question was erroneous, no prejudice could have resulted from the answer which it sought, which was either "Yes" or "No." The answers given were not responsive to the question, but they were not objected to, nor was any effort made to have them excluded. The defendant claims that the evidence was immaterial, but he has not preserved any right to object to it at this time, and for that reason the objection he makes can not be further considered.

II. Section 1000 of the Code contains provisions as follows: "Persons meeting each other on the

2 HIGHWAYS:  
use of: turn-  
ing to left in  
violation of  
statute: colli-  
sion: negli-  
gence.

public highways shall give one half of the same by turning to the right. All persons failing to observe the provisions of this section shall be liable to pay all damages resulting therefrom, together with a fine not exceeding five dollars, but no prosecution shall be instituted except on complaint of the person wronged." The defendant asked the court to instruct the jury that if they found "from a fair preponderance of the evidence that the son of the plaintiff, on meeting the defendant upon the highway in question, turned to the left, instead of to the right, then, and in that case, the son of the plaintiff did not use reasonable care and diligence, and was guilty of negligence, and your verdict shall be for the defendant, unless you should further find, from a fair preponderance of the evidence, that the defendant, well knowing this fact,

recklessly and wantonly drove upon and against the horse in question, and caused the injury complained of." There was no evidence that the defendant knew that the son had turned to the left until the moment of collision; hence there was no evidence that the defendant, knowing that fact, had recklessly and wantonly driven against the horse which was injured. The evidence showed without conflict that the son did turn to the left, and the theory of the instruction asked is, therefore, that the fact that the son turned to the left was in law conclusive evidence of negligence, which would defeat a recovery by the plaintiff. The court refused to instruct the jury as asked.

Numerous authorities have been called to our attention which define and illustrate what is known as the "law of the road." Some of them are referred to in Elliott's Roads & Streets, 618 *et seq.*, 1 Thompson on Negligence, 281 *et seq.*, and 2 Shearman & Redfield on Negligence, section 649. In the sections of 2 Shearman & Redfield on Negligence cited it is said that, "it is the universal custom in America for travelers, vehicles, and animals under the charge of man to take the right hand of the road when meeting each other, if it is reasonably practicable to do so; and this rule is enforced by statute in many states, so far as it relates to travelers in vehicles or on horseback. The statutes upon this subject generally prescribe that travelers shall pass on the right of the center of the road. This means the center of the lawfully worked part of the road. No one is bound to leave that part of the road while there is room upon it, even though the smooth part be entirely on one side of the road." A statute of Massachusetts requires every traveler reasonably to "drive his carriage or other vehicle to the right of the middle of the traveled part of the road" upon meeting a carriage or other vehicle. *Parker v. Adams*, 12 Metc. (Mass.) 418. A statute of New Hampshire

requires that all persons meeting each other on any road within the state, traveling with carriages, shall reasonably turn to the right of the center of the traveled part of such road. It was said in *Brooks v. Hart*, 14 N. H. 309, that the object of the statute was "to facilitate and render safe the public travel, and to prevent all interruptions thereof by prescribing the duty of each traveler in reference to every other, and by pointing to each the part of the way over which he may in safety travel without meeting with other obstacles to impede his progress, or from which he might otherwise suffer detriment." A statute of Kentucky provides that "all vehicles, of every kind, meeting, shall give to each other one half of the macadamized part of the road, each passing to the right." *Johnston v. Small*, 5 B. Mon. 27.

Our attention has not been called to any decision which construes a statute in all respects like that of this state, but we may well consider what may be termed the "common law" of the road, and decisions construing it, and statutes which are designed to regulate and make safe, and free from interruption, travel upon public ways. The terms "highway" and "road," as used in the statute of this state, include bridges, and may include streets of towns. Code, sections 45, subdivision 5, 952, 953. Bridges need not be more than sixteen feet in width. Code, section 1001. But highways are from forty to sixty-six feet in width. Code, section 921. The streets of a town may be much wider. The appellant contends that he was entitled, not merely to one half of the traveled portion of the traveled highway, but to one half of the whole of it, at the place of meeting. The language of the statutes is that "persons meeting each other on the public highways shall give one half of the same by turning to the right," and we are of the opinion that in a proper case a person so meeting another would be entitled to one

half of the full width of the roadway. We are not prepared to say, however, that in all cases where two persons approach each other on a public highway with the intent of passing, it is the duty of each to use only that part of it which is on his right of the center, and that, if either should pass the other on the left of such line, he would violate and thus incur the penalty of the statute. It is only when one meets another that he is required to turn to the right. He has the right to use any part of the highway which is unoccupied, and which is not desired for the use of another. *Dunham v. Rackliff*, 71 Me. 347; *Johnson v. Small*, 5 B. Mon. 27; *Parker v. Adams*, 12 Metc. (Mass.) 418; *Aston v. Heaven*, 2 Esp. 533; *Daniels v. Clegg*, 28 Mich. 42. Among the definitions of the word "meet" given by Webster are the following: "To come together by an approach from an opposite direction; to come upon or against; to come together by mutual approach; to come face to face; to join." As used in the statute under consideration, the phrase "persons meeting each other" does not mean merely persons passing each other while going in opposite directions, but it implies a coming together in such manner that there would be an actual collision, or an apparent danger of one, if they should pursue their course without change of direction. If one person travel along one side of a highway, and another passes along the other, there is no "meeting," within the meaning of the statute, and no violation of its provisions, and that would be true even though each person should be on the left side of the highway. To hold otherwise would be to ignore the evident purpose of the statute. Although a violation of it is made a criminal offense, yet no prosecution can be instituted except on the complaint of the person wronged. But a person is not wronged unless his right to use the highway is in some way interfered with by another. All persons have the right to use public high-

ways in a lawful manner for lawful purposes, but a person not desiring a given part of a highway for his own use can not prevent others from making a proper use of it.

It frequently happens that the traveled and only practicable part of a highway is on one side of its center. Where that is the case, if the theory of the appellant be true, every one who passes along the left of the center is liable to a fine at the instance of each person going in the opposite direction whom he passes, even though such person is not in any manner interfered with, but, at his own election, travels along the outer side of the highway, leaving ample room for the passage of persons and vehicles going in the opposite direction. It is scarcely necessary to say that the statute was not intended to impose fines in cases of that kind. In this case, had the defendant continued in the traveled part of the highway, there would have been no meeting, within the meaning of the statute, and, therefore, no violations of its provisions. What the son of the plaintiff did was to try to avoid meeting the defendant, and it can not be said as a matter of law that, having failed in this attempt, he was negligent in making it. In the case of *Johnson v. Small*, 5 B. Mon. 27, it appeared that the plaintiff's team in ascending a hill was occupying the left part of the road when a stage suddenly appeared, descending the hill, but a short distance from him. He could not have crossed the road in time to avoid a collision, and it was held, in effect, that he was not negligent, and that he could recover for injuries which were caused by the stage. In *Wrinn v. Jones*, 111 Mass. 360, it appeared that a collision occurred between the teams of the plaintiff and the defendant on a bridge. The trial court instructed the jury that the mere fact that the defendant was on the left side of the bridge when the accident occurred was not evidence of negligence; that he had a right to

travel on all parts of the bridge, the only obligation imposed upon him being to reasonably turn to the right; and that instruction was approved, the supreme judicial court of Massachusetts holding that the whole question of fact was rightly submitted to the jury. In *Clay v. Wood*, 5 Esp. 44, it was said that a person whose property was injured while on the wrong side of the road might, nevertheless, recover damages, if there was ample room for the party who caused the accident to pass in safety, and that the question was for the jury to determine. The general rule seems to be that, where a collision occurs between the horse or vehicle of a person on the wrong side of the road and that of a person coming towards him, the presumption is that it was caused by the negligence of the person who was on the wrong side of the road, but that his presence on that side may be explained and justified. 2 Shear. & R., Neg., section 650; Elliott on Roads & Streets, 620. We conclude that the fact that the son of the plaintiff was on the left of the center of the road when the accident in question occurred was at most only *prima facie* evidence of negligence. The instruction under consideration was, therefore, properly refused.

III. Complaint is made of the fifth paragraph of the charge. We find, however, that no objection was

made to it when it was given, and that the giving of it was not assigned as error.

3 Instructions:  
when properly  
refused:  
objections too  
late.

It will not, therefore, be further considered.

Numerous other questions have been discussed which are not of sufficient importance to be considered in detail. It is insisted that the court erred in refusing certain instructions asked by the defendant in addition to the one we have considered. We find, however, that so far as they are correct and applicable to this case, they were substantially given in the charge. The court failed to state in connection with each reference to the evidence required to justify a verdict for

the plaintiff that it must be a preponderance of the evidence, but it was not necessary to do so. The jury were charged that the burden was upon the plaintiff to prove by a fair preponderance of the evidence certain facts to entitle him to recover, and it was not necessary to repeat that statement. Other objections to the charge are made, but we do not find them to be well founded.

IV. It is said that the verdict is not sustained by sufficient evidence, for the reason that it does not show that the accident was the result of the carelessness or negligence of the defendant, but does show it was wholly caused by the carelessness of the son of the plaintiff, and that the accident was without

fault on the part of the defendant. Although there was much conflict in the evidence, the jury were authorized to find that the son of the plaintiff was not in any respect negligent in turning to the left, and that he was diligent in seeking to avoid the accident. They were also justified in finding that the defendant drove at a high and dangerous rate of speed, without using due care to prevent collision with persons who might be traveling on the road.

It is the well known usage in this state, general, if not universal, for pedestrians and horsemen to yield all of the traveled way to vehicles, and for light vehicles to yield in like manner to heavy ones. The usage is not confined to this state but prevails in others. In the case of *Washburn v. Tracy*, 2 D. Chip. 136, decided by the supreme court of Vermont in the year 1824, it was said: "It is ordinarily the duty of a person on horseback to give the traveled path to one who is traveling in a wagon or other vehicle, sanctioned by common consent and immemorial usage." In *Grier v. Sampson*, 27 Pa. St. 192, it was said: "It is the general custom of the country for persons meeting on

4. HIGHWAYS:  
use of: turn-  
ing to left:  
collision: neg-  
ligence: evi-  
dence to sup-  
port verdict.

a highway to pass on the right; but, when a horseman or a light vehicle can pass on the left of a heavily-laden team, it is their duty to give way, and leave the choice to the more unwieldy vehicle." See, also, to the same effect, *Beach v. Parmeler*, 23 Pa. St. 196. Custom can not control a statute, and it can not be said that in this state it is the duty of pedestrians and horsemen to yield the traveled way to vehicles, nor for persons driving teams lightly loaded to yield to those more heavily loaded; but to do so is not only not unlawful, but to perform an act which is recognized by an enlightened public as meritorious, and to be commended. In fact such a practice is demanded by public opinion. When a person yields the way for the benefit of another, it is an evidence of care, rather than of negligence. In this case the brothers were riding together. They were made aware of the approach of the defendant before they could see him, by the noise of his horse and cart. They testify that the defendant approached them very rapidly. The existing darkness seemed to make it advisable for them to leave the traveled way in order to avoid accident, and general usage sanctioned their doing so as an act of courtesy. The space between the traveled portion of the road and the north fence was from eight to ten feet in width. Fred could have turned to the right, as John did, and perhaps would have passed the defendant safely if he had done so; but, in view of the darkness and the narrowness of the space on that side, it can not be said as a matter of law that he was negligent in turning to the left. He not only turned in that direction, but went so far that there was a space of nearly twenty feet between his horse and that of his brother through which the defendant could have driven. It is not probable that the defendant saw Fred and the horse he was driving in time to prevent the accident, but he was chargeable with knowledge of the fact that persons sometimes ride

black horses in dark nights, and that horsemen commonly leave the traveled way to vehicles they meet. He can not relieve himself from liability by showing that the collision was not intended by him. Whether Fred, under all the circumstances in the case, was negligent in turning to the left, and whether the defendant was negligent in driving in the darkness at a high rate of speed, were questions for the jury to determine. We are of the opinion that the evidence to sustain their conclusions is ample.

The judgment of the district court is AFFIRMED.

ROTHROCK, J. (*dissenting*).—I do not concur in either the reasoning or the conclusion of the foregoing opinion. The evidence in the case shows beyond all dispute that, if the plaintiff's son had not left the traveled part of the road by turning to the left, the horse would not have been injured. This fact is made absolutely certain by the other fact that one of the riders did turn to the right, and the defendant did not drive within twenty feet of him. Now, it may be conceded that there may be circumstances which would excuse persons from turning to the right. As held in *Earing v. Lansing*, 7 Wend. 185, this rule of the road must be strictly observed, unless obstacles, insuperable or extremely difficult to overcome, intervene. There is not one word of evidence which even tends to excuse the young man for turning to the left. It surely is the law of this case that there is no liability unless there is good reason for violating the statute. It is a general rule that, when one is injured while violating a statutory provision or some legal duty, it is incumbent on him to show that, although he was chargeable with a violation of law or breach of duty, his act did not contribute to produce the injury of which he complains. I do not think it is important to determine by technical definitions what is meant by the word "meet." It seems to

me it can have no other meaning, as it is used in the statute, than persons approaching, and about to pass each other, on a public highway. It is said in Elliott on Roads and Streets, 620, that "one who violates the law of the road, by driving on the wrong side of the way, assumes the risk of all such experiments, and must use greater care than if he had kept on the right side of the road. If a collision takes place, the presumption is generally against the party on the wrong side. Especially is this true when the collision takes place in the dark." I doubt if any authority can be found in conflict with this rule. I can not understand why it is necessary to discuss the matter of usage in meeting upon the public highway. In some states custom and usage obtains, in the absence of statute. But the statute of this state defines the rights and prescribes the duty of travelers in this respect without reference to the means of locomotion. It appears to me that the plaintiff's son had no semblance of excuse for violating the law by turning to the left; and not only this, but, if he had not turned at all, the horse would not have been injured. In this state of the case, the instruction asked by the defendant should have been given, because the evidence conclusively showed, without conflict, that the plaintiff was not entitled to recover.

GRANGER, J., concurs in this dissent.

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THE STATE OF IOWA, Appellee, v. F. J. KEALY,  
Appellant.

**Criminal Law: EXTRADITION: TRIAL FOR DIFFERENT OFFENSE.** Where a person is indicted for a certain offense in this state, and he is brought for trial thereon from another state upon the requisition of the governor, and in the meantime he is indicted in this state for another offense, he may be tried upon the last indictment, without first giving him a reasonable opportunity to return to the state from which he was brought.

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*Appeal from Jones District Court.*—HON. JAMES D. GIFFEN, Judge.

SATURDAY, OCTOBER 7, 1893.

THIS is an appeal by the defendant from a judgment in a criminal prosecution upon an indictment charging him with the crime of forging a promissory note.—*Affirmed.*

*John S. Welch*, for appellant.

*John Y. Stone*, Attorney General, and *Thos. A. Cheshire*, for the State.

ROTHROCK, J.—The defendant was indicted for the crime of obtaining money under false pretenses. After the crime was committed, he left this state, and went to the state of New York. A requisition was made upon the governor of that state for the extradition of the defendant, upon the ground that he had been indicted in this state, and he was returned to this state in pursuance of the requisition. After he was brought to this state, and while he was in custody under that indictment, he was indicted for forging a promissory note. When he was brought into court on the last indictment, he made a motion to be discharged from restraint on the indictment for forgery, on the ground that he was not extradited on that charge, and that, being in restraint on the first charge, he could not be required to plead to the second indictment, nor could he be restrained of his liberty by reason thereof, he never having had an opportunity to return to the state of New York. The court overruled the motion, and required the defendant to plead to the indictment. A plea of guilty was entered, and the defendant was sentenced to imprisonment in the penitentiary for two years.

It appears from the abstract in the case that the two indictments were founded upon wholly different and distinct charges, and, as we understand it, they did not involve the same transaction. The record does not show what disposition was made of the indictment of obtaining money under false pretenses. It is stated in argument that the defendant was sentenced to imprisonment for one year on that charge.

The question presented for decision is stated by counsel for the appellant in the following language: "Can a party taken from one country or state to another, upon proceedings of extradition, legally be held to answer to another and different offense than that upon which he was so extradited, without being given an opportunity to return to the state of his asylum?"

This case does not involve any question of international extradition. The defendant's removal from the state of New York to this state was not procured by any fraudulent pretense or representation made to him for the purpose of bringing him within the jurisdiction of our courts. It is provided by section 2, article 4, of the constitution of the United States, that "a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime." There was no abuse of this constitutional provision in this case. Extradition was not resorted to as a means of procuring the presence of the defendant in this state for the purpose of serving him with process in a civil action. There can be no question that the grand jury of Jones county, in this state, had the power to find the second indictment against the defendant, and there was the same right of extradition upon that charge that there was on the first indict-

ment. His counsel states in argument that he was sentenced to the penitentiary for one year on the first indictment, and the imprisonment of two years on the second indictment was to commence at the expiration of the imprisonment on the first. It will be observed that what the defendant demanded was that the second indictment should be held in abeyance until he was discharged from imprisonment on the first, and until a reasonable time and opportunity had been given him after his release on the first charge to return to New York, from which asylum he was forcibly taken on the first charge.

There is a conflict of authority upon this question. This court is committed to the doctrine that, when a person is properly charged with a crime, the courts will not inquire into the circumstances under which he was brought into this state, and within the jurisdiction of the court. *State v. Ross*, 21 Iowa, 467. It is true that the defendants in that case were not brought to this state under a requisition upon the executive of another state. They were arrested in the state of Missouri without legal warrant, and after being forcibly brought to this state they were rearrested, and turned over to the civil authorities, and indicted. It is said in that case that, "the officers of the law take the requisite process, find the persons charged within the jurisdiction, and this, too, without force, wrong, fraud, or violence on the part of any agent of the state, or officer thereof. And it can make no difference whether the illegal arrest was made in another state or another government. The violation of the law of the other sovereignty, so far as entitled to weight, would be the same in principle in the one case as the other. That our own laws have been violated is sufficiently shown by the indictment. For this the state had a right to detain the prisoners, and it is of no importance how or where their capture was effected." In the case at bar the

defendant was properly indicted, and, when process was issued on the indictment, it is of no importance by what authority he was brought into this state. In support of this doctrine: *State v. Stewart*, 60 Wis. 587; *Ham v. State*, 4 Tex. App. 645; *State v. Brewster*, 7 Vt. 118; *Dow's Case*, 18 Pa. St. 37; *State v. Wensel*, 77 Ind. 428; *Kerr v. People*, 110 Ill. 627. The first two cases above cited are founded on facts substantially the same as the case at bar. As we have said, there is a conflict of authority upon the question. The cases will be found collected in 7 Am. and Eng. Encyclopedia of Law, 648. We have no disposition to depart from the rule adopted by this court in *State v. Ross*, *supra*, and the judgment of the district court is **AFFIRMED**.

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THE STATE OF IOWA, Appellee, v. F. J. KEALY, Appellant.

**Obtaining Money by False Pretenses; SUFFICIENCY OF INDICTMENT.** An indictment for obtaining money upon false pretenses charged that the defendant induced certain persons to pay him a certain sum for a note, by representing to them that he was the owner of it, and that it was genuine; that such representations were false, and shown by the defendant to be false, and that the note was a forgery. The indictment contained a copy of the note, from which it appeared that the first part of it was in the ordinary form of a negotiable note, payable to the order of the S. M. Company, and that this was followed by a stipulation that it was given as a conditional settlement for a certain sewing machine, and was subject to the approval of the S. M. Company, and that the note was endorsed "S. M. Company, by F. W. C., Agent." The indictment was demurred to on the ground that the note was but a conditional contract, and never became binding by the approval of the S. M. Company, and hence the purchasers took nothing by the purchase, whether the note was genuine or forged, and that they were not defrauded. *Held*, that the indictment was sufficient.

*Appeal from Jones District Court.*—HON. J. D. GIFFEN,  
Judge.

SATURDAY, OCTOBER 7, 1893.

INDICTMENT for obtaining money by false pretenses. The defendant demurred to the indictment, and, the demurrer being overruled, elected to stand upon his demurrer; whereupon judgment was entered against him, from which he appeals, and assigns as error the overruling of his demurrer.—*Affirmed.*

*John S. Welch*, for appellant.

*John Y. Stone*, Attorney General, and *Thos. A. Cheshire*, for the State.

GIVEN, J.—The charge in the indictment is, in substance, this: That the defendant, for the purpose of inducing G. W. & G. L. Lovell to purchase and pay to him twenty-eight dollars for the promissory note set out, represented to them that he was the owner of said note; that it was the true and genuine note of Joseph Lawrence, and was unpaid; that said G. W. & G. L. Lowell were induced by said representations to pay to the defendant twenty-eight dollars in money for said promissory note; that in truth and in fact the defendant was not the owner of said note, and had no interest therein; that it was not the note of Joseph Lawrence, and did not bear his signature, but was a forgery; all of which the defendant at the time well knew. The promissory note as set out in the indictment is as follows:

“\$30.

NOVEMBER 28, 1891.

“For value received, on or before the first day of July, 1892, I, the undersigned, of the town of Prairieburg, county of Linn, state of Iowa, promise to pay to the order of the Singer Manufacturing Co., thirty dollars, payable at Monticello, Iowa, with interest at seven per cent. from date, and current exchange, and charges when collected by express companies, and with

ten per cent. fees if the same is collected by attorney. And it is agreed that this note shall be due on demand, if the maker attempts to move out of said county. This note is received as a conditional settlement for a Singer sewing machine, No. 9,133,502, and subject to the approval of the Singer Manufacturing Company, Chicago, Ill. [Signed] J. LAWRENCE,

“Postoffice, Prairieburg.

“No credits allowed on this note unless indorsed by the Singer Manufacturing Co. No contract not on the face of this note, or contrary to its general conditions, will be accepted by this company.”

On the back of said note appeared the following indorsement: “The Singer Manufacturing Co. By F. W. Clark, Agent.”

The grounds of the appellant's contentions, as presented in the demurrer and in argument, are as follows: His first claim is that the instrument is but a conditional contract, and created no liability, was not negotiable, or of any value, until approved by the Singer Manufacturing Company; that, as no such approval is alleged to have been made, or represented to have been made, the Lovells took nothing by the purchase, whether the instrument was true or forged, and hence were not defrauded. The argument ignores two very important facts appearing on the indictment, that is, that the fraud upon the Lovells was in what was obtained from them, rather than in what was given to them; and that the note purports to bear the indorsement of the Singer Manufacturing Company, by F. W. Clark, agent. If the note was genuine it would hardly be claimed that, after thus indorsing it, and putting it into circulation, the company, or anyone for it, would be heard to say that it was not approved. By the approval, the note, if genuine, became a binding obligation, and negotiable by indorsement. The note presented by the defendant for sale purported to be all this, and showed no

usual conditions to destroy its negotiability. The judgment of the district court was clearly correct, and is, therefore, **AFFIRMED.**

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**FERDINAND PANTHER, Appellee, v. FRED TRAUMAN, Appellant.**

**Partition Fences: KIND OF FENCE: AGREEMENT CONSTRUED.** Where the owners and occupants of adjoining farms agreed to erect and maintain each a certain part of a division fence, and one of them kept hogs and the other did not, and, without any agreement as to the kind of fence to be maintained, they each built, and for sixteen years maintained, a hog-tight rail fence, *held*, that no obligation arose therefrom to maintain a hog-tight fence, but that it was the right of the one who did not keep hogs, when his part of the fence required renewing, to replace it, without previous agreement, but with notice to the other party, with a fence which was not hog-tight, provided it was a lawful fence, as prescribed by statute, and that for depredations committed by the hogs of the other party, which came upon his land through such lawful fence, he was entitled to recover.

*Appeal from Des Moines District Court.*—**HON. JAMES D. SMYTH, Judge.**

**SATURDAY, OCTOBER 7, 1893.**

**THIS** is a proceeding to recover damages alleged to have been wrongfully caused by swine owned by the defendant. From an assessment made by the township trustees in favor of the plaintiff the defendant appealed to the district court. A submission of the cause in that court resulted in a judgment in favor of the plaintiff, from which the defendant appeals. *Affirmed.*

*A. H. Stutsman*, for appellant.

*W. W. Dodge*, for appellee.

**ROBINSON, C. J.**—The trial court has certified for the determination of this court questions as follows:

“(1) When two farmers in this state agree between themselves to erect and maintain each a certain part of a partition fence dividing their land, and one of them keeps swine on his premises, and the other none, and without express agreement as to the kind of fence to be kept, or whether to be hog-tight or not, they each maintained a rail fence for sixteen years under said agreement, of their respective parts of said fence, can one of them, without a previous agreement, but with notice to the other, change from a tight rail fence which he has erected and maintained, and which needs repairing and rebuilding, because old and rotten, to a post and barbed wire fence, composed of good posts, not more than one rod apart, with the lower barbed wire not more than twenty nor less than sixteen inches from the ground, and the upper wire not more than fifty and not less than forty-eight inches in height, recover damages from the one who keeps swine upon his premises, with the knowledge of the other, for waste committed by such swine passing under said fence upon the premises of the one who erected the new fence, the herd law of the state being in force in Des Moines county?

“(2) Can a party whose duty it is to erect and maintain a partition fence, when he knows the other keeps swine upon his premises, change the fence composed of rails to one composed of posts and barbed wire, under which the swine could pass, with notice, but without a previous arrangement with the adjoining owner or order of the fence viewers, recover damages from trespass of such swine in going upon his premises under said fence?”

It will be noticed that the agreement certified did not specify the kind of fence which should be maintained; that the one actually maintained for sixteen years had become old and decayed, and needed repairing and rebuilding, and that the one erected to take

its place was made of posts and barbed wire. So far as described, it is a lawful fence, within the definition of section 1507 of the Code, as amended. It is claimed by the appellee, and not denied by the appellant, that it was a lawful fence, and for the purposes of this appeal it must be so regarded. That it would not prevent the passing of swine is shown. Section 1489 of the Code provides that "the respective owners of lands inclosed with fences shall keep up and maintain partition fences between their own and the next adjoining inclosure so long as they improve them in equal shares, unless otherwise agreed between them." It is not shown that this case falls within that provision. Assuming that it does, however, the fence required by it is only a lawful fence, when both the owners or occupants of the adjoining inclosures do not use them for the purpose of pasturing swine or sheep. If either of such owners or occupants desires to have the partition fence made tight, he has the right to make it so at his own expense, and may take from it the material he added to it whenever he elects so to do. Code, section 1507.

It is contended by the appellant that the effect of the agreement, coupled with the fact that a tight fence was maintained under it by plaintiff for sixteen years, required him to maintain that kind of a fence so long as both parties improved the adjoining inclosures in equal shares, unless they should agree to do otherwise. We find no authority for such a conclusion in the agreement. In the absence of specifications or other means for determining the kind of fence contemplated, it will be presumed to have been any one which should meet the requirements of the statute. We conclude that the questions certified must be answered in the affirmative. The judgment of the district court is, therefore, **AFFIRMED**.

JOHN A. PETERSON, Appellee, v. JOHN PIERSON,  
Appellant.

**Easement:** CHANGE OF RECORDED AGREEMENT BY PAROL: PURCHASER WITH ACTUAL NOTICE. One M., in his lifetime, conveyed to the plaintiff a right of way over certain land, which right, however, was to terminate upon the breach, by the plaintiff, of certain conditions named in the conveyance, which was duly recorded. Afterward, by parol agreement between M. and the plaintiff, these conditions were modified, and the plaintiff continued to enjoy the right of way under the modified conditions. Afterward M. died, and his executor conveyed the land in question to the defendant, the deed containing a reservation of the right of way. Moreover, the defendant, long before, and at the time of his purchase, knew that the plaintiff was enjoying the right of way, with the acquiescence of M., without observing the conditions contained in the recorded agreement. *Held*, that the defendant was charged with actual notice of the oral agreement under which the plaintiff was enjoying the right of way, and that he purchased subject thereto, and could not be heard to say that the right of way was terminated on account of the plaintiff's failure to observe the conditions named in the agreement of record.

*Appeal from Des Moines District Court.*—HON. JAMES D. SMYTH, Judge.

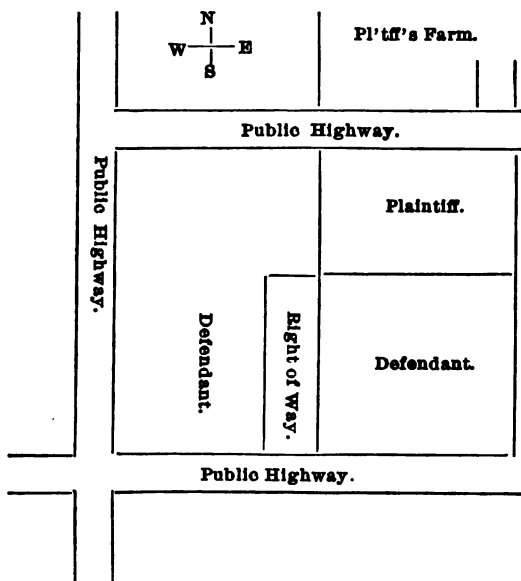
SATURDAY, OCTOBER 7, 1893.

ACTION to enjoin the obstruction of a right of way. There was a decree for the plaintiff, and the defendant appeals.—*Affirmed*.

*Newman & Blake*, for appellant.

*A. H. Stutsman*, for appellee.

GRANGER, J.—The location of the right of way in controversy is indicated by the following diagram:



The basis of plaintiff's claim to the right of way is the following, "Exhibit A," attached to petition.

"This agreement, made and entered into this day, by and between John Murphy and Mary E. Murphy, his wife, parties of the first part, and John August Peterson of the second part, witnesseth: that the said parties of the first part have this day sold to the said party of the second part the right of way over the following described land, situated in Des Moines county, state of Iowa, on the condition hereinafter set forth, to wit: The east twelve (12) feet of the south eighty-one (81) rods of the west half of the northwest quarter of section twenty-one (21), in township seventy-two (72) north, of range two (2) west. The right of way is, and shall be, for the sole use and benefit of the said John August Peterson and his heirs; and, should he or they sell or in any manner dispose of the farm now owned by him in said township, then and in that case the said right of way shall revert to the then owner of the eighty acre tract from which it was taken.

"In consideration of the foregoing, the party of the second part agrees to furnish all the material, and build, and keep in good repair, a good and lawful three-strand barb-wire fence on line between said right of way and the eighty-acre tract from which it is taken, belonging to said parties of the first part, and also to put in, and keep in good repair, a substantial gate across the south end of said right of way, and also a good and substantial gate to separate said right of way from the northeast quarter of the northwest quarter of said section. The party of the second part agrees to pay the expense of drawing all legal papers in this matter.

"It is further agreed by the parties hereto that, in case the said party of the second part shall surrender and cancel this agreement, or in case of forfeiture of the same for any cause, he shall be entitled, upon giving reasonable notice of his intention so to do, to remove any wire or other fence material placed alongside or on said right of way by him, in either of which cases the party of the second part agrees to give immediate and peaceable possession of said right of way to the owner of said west half of said northwest quarter of section twenty-one (21), township seventy-two (72) north, of range two (2) west, and the giving of possession is hereby made a part of the essence of this contract.

"In witness whereof we have hereunto set our hands this 29th day of July, 1887.

[Signed] JOHN X. MURPHY.

His

Mark.

Her

[Signed] MARY X. MURPHY.

Mark.

[Signed] J. AUGUST PETERSON."

This agreement was duly acknowledged, and filed for record. At the time of making the agreement the land indicated on the plat as that of the defendant was owned by Murphy, who was a party to the contract,

and is now deceased. Since his decease the land has been conveyed by the executor of his estate to the defendant Pierson, who owns the same. The petition charges that the defendant has, since he purchased the land, obstructed the right of way in "divers ways, and continues so to do." The defendant admits that he has placed obstructions on the right of way, as charged, and claims the right so to do because of the failure of the plaintiff to erect a fence on the west line of the right of way, as required by the terms of the agreement creating the easement; and also because the plaintiff has left the gates on the right of way open, whereby defendant has been damaged and annoyed.

At the time of making the agreement there was no fence on either side of the contemplated right of way, and all of the land now owned by the defendant was one inclosure, and it was not then contemplated that the right of way should be fenced on both sides, and the land west of the right of way was to be the cultivated land of Murphy. It clearly appears from the evidence that the plaintiff commenced to erect a fence on the west side, as specified in the agreement, and the posts were set for that purpose, when by a verbal agreement with Murphy, the plaintiff changed and set the fence on the east line of the right of way, it being thought by Murphy that by such a change the ground used as a right of way could be used as turning ground in the cultivation of the land adjoining. With this change the conditions upon which the plaintiff was to have the right of way were fully performed, and the right of way was entered upon and enjoyed by the plaintiff during the lifetime of Murphy, and he was so enjoying it when the defendant purchased the land.

It is insisted by the appellant that the failure of the plaintiff to make the fence on the west line of the right of way operates to defeat his right to its use as against him because of the condition of the record title to the

right of way when he purchased the land from the Murphy estate. It is true that the recorded agreement specified that the plaintiff should make and maintain a fence along the west line, and it is said that this was a "covenant running with the land, duly indexed and recorded," and that it "could not be changed by a subsequent parol agreement of the parties thereto, so as to defeat the rights of the grantee (defendant) to the fence."

The record was, as claimed by the appellant, notice to the world of the original contract, and it may be conceded that it would fully protect third parties purchasing upon the strength of such notice; or, in other words, it would protect the parties relying on the information imparted by the record. The authorities cited by the appellant state no broader rule, nor is more contemplated by our recording act, and the decisions under it. In fact, the appellant does not contend for a different rule; but there is a contention as to the defendant's having actual knowledge of the real situation as between the plaintiff and Murphy. It is true, there is no evidence showing that the defendant knew of the talk or agreement between them to change the fence from the west to the east side of the right of way, but it is true that the defendant, before the location of right of way, knew of the situation as to fences, and he knew of the change by the building of the fence, and of the putting in of the gates before Murphy died, and knew how the right of way was being occupied. He frequently used the right of way himself to get from a place he then occupied to the public highway, and this was the exact situation when he afterward bought the land. He positively knew that the easement was being used under conditions other than those specified in the recorded agreement. This condition continued, with his knowledge, for such a time as to put him on inquiry to know the facts. The fact that he knew the plaintiff

to be in possession of the grant with the knowledge of the grantor, under the changed conditions, is highly significant, and we do not hesitate to say that he took his title charged with notice of the facts as they existed between the plaintiff and Murphy. Added to what has been stated, is the fact that in the deed to the defendant is a reservation of the right of way to the plaintiff, indicating, if nothing more, that the grantors regarded the conditions upon which the easement was to pass as complied with, and the deed was certainly accepted with knowledge of what had been done.

The court below seems to have determined the facts and the law in accord with our view, and its judgment is **AFFIRMED**.

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**THE STATE OF IOWA, Appellee, v. F. S. CRAFTON,  
Appellant.**

1. **Criminal Law: CHANGE OF VENUE: LOCAL PREJUDICE: SUFFICIENCY OF SHOWING.** The defendant, on the eleventh day after being indicted for murder in the first degree, moved for a change of venue on the ground of the prejudice of the people of the county, and supported his motion by affidavits showing that, after the alleged murder, lengthy and sensational comments were published in the local daily papers, in which the defendant was denounced as a slayer and a villain, and in which it was charged that he had seduced the deceased; that his father had been guilty of a like offense to that charged in the indictment, and had been tried therefor; that the defendant had committed burglary and robbery, and had been implicated in stealing a diamond ring from the finger of the decedent after her death; that he killed the decedent to conceal the fact that she was pregnant by him; that he had murdered a man in another state, and was then a fugitive from justice; and that he was engaged in enticing women away for the purposes of prostitution. The state filed the counter affidavits of ten citizens, stating that they had read the newspaper accounts, or some of them, in relation to the alleged murder, and had heard the matter talked of some among the residents of the county, and, from what they had heard and read, they were of the opinion that there was no prejudice against the defendant. *Held*, that while the motion was addressed to the sound discretion of the court, it was error to overrule it upon the showing made.

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2. ———: **READING INDICTMENT TO JURY: ASSISTANT TO COUNTY ATTORNEY.** The provision of the statute that the clerk or prosecuting attorney shall read the indictment and state the defendant's plea to the jury, is sufficiently complied with when that duty is performed by one who is assisting the county attorney, under the employment of private parties.
3. ———: **CONDUCT OF COUNSEL: OPENING STATEMENT AND ARGUMENT:** Counsel for the state, in the opening of a criminal trial, may properly state what, from all the circumstances, he in good faith expects to prove, even though it turns out that the evidence does not fully support his statement; and, in the argument, he may not only discuss the testimony, but may properly deduce therefrom facts which may be legitimately inferred from what appears in the record.
4. **Criminal Evidence: MURDER: RES GESTÆ.** On a trial for murder, the testimony of a policeman, who arrived at the scene of the homicide after it had been committed, as to what an eyewitness thereof said about it in the presence of the defendant, was admissible for the state, there being no evidence that the defendant was not in a condition to hear, or did not hear, what was said.
5. ———: ———: **CONDUCT OF DEFENDANT.** In such a case, evidence that, prior to the killing, the defendant slapped the decedent on the ear, and looked cross, was admissible to show the relations of the parties and their feelings toward each other.
6. ———: ———: **CONDUCT AND RELATIONS OF PARTIES.** In such case, evidence that, some days before the murder, the defendant introduced the deceased to the witness as his wife, and rented a room for their use, under a false name, and that the witness saw the deceased in bed with another man, and that the defendant was disrobed in the same room, was material to show the relations of the parties.
7. ———: **ERROR CURED BY INSTRUCTION.** When testimony erroneously admitted is taken from the jury by a proper instruction, the error is cured, and is no ground for a reversal.
8. **Criminal Law: JURY IN CHARGE OF UNSWORN BAILIFF: NEW TRIAL.** The requirement of section 4442 of the Code, that the jury, when it retires to deliberate upon its verdict, shall be in charge of a sworn officer, is mandatory; but the fact that the bailiff who had charge of the jury in a criminal case was not sworn is not ground for a new trial, under section 4489 of the Code, where there was no showing that any prejudice resulted to the defendant from the fact that the bailiff was not sworn.

*Appeal from Polk District Court.*—HON. C. P. HOLMES,  
Judge.

SATURDAY, OCTOBER 7, 1893.

THE defendant was indicted and tried for the crime of murder in the first degree, and convicted of murder in the second degree. He was adjudged to be confined in the penitentiary at Anamosa for the term of fifteen years, and from that judgment this appeal is prosecuted.—*Reversed*.

*L. Kinkead, Hays Bros., and Cole, McVey & Cheshire*, for appellant.

*John Y. Stone*, Attorney General, *W. A. Spurrier*, County Attorney, *C. A. Bishop* and *T. C. Dawson*, for the State.

KINNE, J.—I. Mabel Swartz was, on the night of March 28, 1892, in a house of prostitution, in the city of Des Moines, killed by the contents of a revolver, which was discharged while in the hands of, and being manipulated by, the defendant. The grand jury returned an indictment against the defendant on May 9, 1892, and on May 12, 1892, the defendant waived arraignment, and on the twentieth of the same month entered a plea of not guilty. On the same day he filed a petition and motion, supported by affidavits, for a change of place of trial. The petition was grounded on the claim that excitement and prejudice existed to such an extent among the residents of the county that the defendant could not obtain a fair trial therein. Many specific charges or statements were made in the showing, among the more important of which were the following: That, after the alleged murder, and without any foundation therefor, lengthy, sensational and unjustifiable comments were made and published in the newspapers of the city of Des Moines, which were circulated daily, and which contained serious and damaging charges against the defendant; that they denounced him as

1. CRIMINAL law:  
change of  
venue: local  
prejudice:  
sufficiency of  
showing.

being a slayer and a villain; charged that he had seduced Mabel Swartz; that the defendant's father had been guilty of a like offense, in the state of Illinois, to that charged in the indictment, and that his father was indicted and tried therefor; charged the defendant with burglary and robbery, and with being implicated in stealing a diamond ring from the finger of Mabel Swartz after her death; that Mabel Swartz was pregnant with child, and that the defendant slew her to prevent publicity of such fact; that the defendant had murdered a man in Nebraska, and was then a fugitive from justice; that the defendant was engaged in enticing girls and women away for the purposes of prostitution.

The state resisted the application, and filed the affidavits of ten men to its counter showing. The points made in the resistance were, in brief, that the application did not contain a statement of facts entitling the defendant to the change; that the statements were mere conclusions; that none of the articles referred to were set out; that it did not appear that the articles so published were all that were published by the local press; that it did not appear that the comments of the press, taken together, were not fair; that newspaper comments, no matter of what character, would not justify a change of venue; that the application was not made in good faith, but for the purpose of delay. The ten citizens swore that they had "read the newspaper accounts, or some of them, in relation to the killing of Mabel Swartz by F. S. Crafton," and had heard the matter talked of some among residents of said county, and, from what they had heard and read, they were of the opinion that there was no prejudice against the defendant, and that Ex-Mayor Swartz had no influence in Polk county. The court overruled the motion, and the trial began in the city where the alleged crime was committed, and about sixty days after the tragedy had occurred.

The application for a change of venue is addressed to the sound discretion of the court. It is a judicial discretion, and not to be interfered with by us, unless it has been abused. *State v. Rowland*, 72 Iowa, 327; *State v. Beck*, 73 Iowa, 616; *State v. Cadwell*, 79 Iowa, 473; *State v. Woodward*, 84 Iowa, 172.

In the light of the facts above set out, and of the rule of law so wisely established, we are to determine whether or not the court erred in its ruling. We have in mind also that it is the policy of our law to make the execution of justice as speedy as is consistent with a due regard to the rights of a man charged with a grave crime. The resistance does not deny the publication of the articles as charged. It does not deny that they created a prejudice against the defendant, and that such prejudice existed after the killing. The denials of prejudice, as made, relate only to the time of the filing the affidavit of resistance. The only question in controversy between the two showings is, that the defendant's showing is that the excitement and prejudice continued to exist up to the time it was filed, while the state's showing is that it did not exist at that time. It was not incumbent upon the defendant to set out the newspaper articles, especially so as there is no denial that they were published as claimed by the defendant, and that they, for a time at least, had the effect which he claims. The question of prejudice is a question to be determined from facts before the court in the showings made. Now, it is clear that the showing of the defendant, in the absence of one made by the state, would have entitled him to the change. What facts, then, appear in the state's showing which would be held sufficient to overcome that made by the defendant? It does not appear that the state's affiants had read all, or even any, of the articles which contained the specific charges set out in the defendant's showing, and on which the change is prayed. There is not a fact which shows

that the change was sought for delay, and not in the best of faith. There is nothing to show what the opinion of the state's affiants is based upon, except that they had read "some" of the accounts of the killing, and had heard the matter talked of some among the residents of the county. Doubtless, there may be cases where such a counter showing would be sufficient. That depends upon the facts stated by the other side. But we can not think that, in a case like this, where the defendant is charged with the commission of many and grave crimes, some of them of the most revolting character, the very charging of which was calculated to engender prejudice in the public mind, which would be deep seated and far reaching, such a showing in resistance of the application should be regarded as sufficient. The defendant was a comparative stranger in the city. His associates, to say the least, had been bad, and here was the press of the city poisoning the minds of the people against him by charging him with the commission of innumerable crimes.

Counsel for the state insist that this case is distinguishable from the cases of *State v. Canada*, 48 Iowa, 448, *State v. Nash*, 7 Iowa, 347, and *State v. Billings*, 77 Iowa, 417, in that, in the last two cases, it appeared that there had been threats of lynching made against the defendants, and in the *Canada case* no resistance was filed. These are distinguishing facts; but is public excitement and prejudice, which will prevent a defendant from having a fair trial, to be measured only by a single act in all cases, and that a threat? Must the court, in the exercise of its discretion, say that, because excitement and prejudice have not yet arrived at the point where threats to do personal violence to the person of the defendant are made, therefore it appears that prejudice does not exist? The admitted facts upon which the defendant's application is based, show, to our minds, that an opinion based thereon is

entitled to more weight than one based upon the meager facts stated in the state's showing. *State v. Beck*, 73 Iowa, 616. Each case must depend upon its own peculiar facts and circumstances. We know how difficult it is for an appellate court to see these matters as they may have appeared to the trial judge, and hence it becomes us to be exceedingly careful in passing upon the question of the proper exercise of the discretion vested in the trial court. When, after due investigation, we are satisfied that the trial court has made a mistake, it is our duty to rectify it as far as possible. The language of this court in the case of *State v. Nash, supra*, is applicable in this case. It was there said: "It is important, to maintain the usefulness of our judicial system, that no suspicion of influence from popular excitement in the administration of the law should be allowed to impair the public confidence in the fairness and impartiality of judicial proceedings. An excited state of public feeling and opinion is always the most unfavorable for the investigation of the truth. Not only should the mind of the juror be wholly without bias and prejudice, it should not only be free from all undue feeling and excitement in itself, but it should be, as far as possible, removed from the influence of prejudice and feeling and excitement in others." A man charged with the commission of the grave crime of murder has a right to be tried by an impartial jury, and in a community where his case has not been prejudiced and prejudged. It matters not what the standing or reputation of this defendant may be, or how low his condition, the law throws around him all the safeguards which the enlightened wisdom of the ages has shown essential to the safe, orderly, and impartial administration of justice. Considering the magnitude of the crime charged, the limited time between the homicide and the trial, the showing made for a change of venue, and the weakness

of the resistance, we are impressed with the conviction that the court below erred in overruling the defendant's motion.

Error is assigned on the court's ruling in refusing to continue the case. In the view we have taken on other questions presented, it is not necessary for us to consider this question.

II. A reversal is asked because Judge Bishop, who was appointed to assist the county attorney, read the indictment to the jury, and stated the defendant's plea. The statute provides that "the clerk or district (county) attorney must read the indictment, and state the defendant's plea to the jury." Judge Bishop was employed by private parties. The practice of allowing county attorneys the assistance of private counsel in the trial of criminal cases is of long standing in this state, and has been repeatedly sanctioned by this court. *State v. Fitzgerald*, 49 Iowa, 260; *State v. Montgomery*, 65 Iowa, 483; *State v. Skinner*, 76 Iowa, 147; *State v. Ormiston*, 66 Iowa, 143; *State v. Shreves*, 81 Iowa, 615. Judge Bishop, in reading the indictment and stating the plea to the jury, was acting as county attorney, and there was no error in his so doing.

II. Much of the argument of counsel for the appellant is directed to alleged misconduct on the part of counsel for the state in their addresses to the jury. It is true that counsel referred to some matters not established by the testimony. In the opening of a case some latitude must be allowed counsel in stating what they expect to prove. That on the trial they may not be able to show all that they claimed is not necessarily an indication that the statement was not made in good faith. If, from all the circumstances it appears that the statement was made with a well-founded belief in its accuracy when made, it is all that can be required. It also

2. READING indictment to jury: assistant to county attorney.

3. —: conduct of counsel: opening statement and argument.

appears that both counsel for the state, in their closing arguments, went outside the record, and discussed matters not in evidence. It is the province of counsel not only to discuss the testimony, but they may properly deduce therefrom facts which may be legitimately inferred from what appears in the record. In some instances the objectionable statements seem to have been made by way of reply to what opposing counsel had said, and, in view of the entire record, we do not think that the defendant has any just ground of complaint touching this matter.

IV. It is claimed that the witness Scholes was permitted to detail to the jury conversations which occurred at the house where Mabel Swartz was killed, and which were no part of the *res gestæ*, and which were had in the defendant's absence. Scholes was a policeman, and arrived at the house after the shooting took place. He was called upon to state what was said, by the eyewitness to the tragedy, as to the circumstances under which it occurred. Some of his testimony was ruled out because the defendant was not present when the statements were made. The record shows that the court frequently admonished him to confine his statements to what was said when the defendant was present. The court seems to have exercised the utmost care in this respect. It is claimed that the defendant was in such a disturbed state of mind, and there was so much confusion, that he did not hear what was said. We think the claim is not well founded. The defendant was present, within hearing distance, and, for all that appears, his sense of hearing was not impaired. Under such circumstances, and in the absence of evidence to the contrary, it must be presumed that he did hear what was said.

V. The witness Brandt testified that, several days prior to the shooting of Mabel Swartz, the defendant

4. CRIMINAL evidence: murder: *res gestæ*.

5. —: —: and Mabel were at his place, and that the  
conduct of defendant. defendant slapped Mabel on the ear, and  
that the defendant looked cross. His  
evidence was objected to as incompetent, irrelevant,  
and immaterial, and not a part of the *res gestæ*. We  
have no doubt that the evidence was admissible as  
tending to show the relations of these parties and their  
feelings toward each other. The testimony of the  
witness as to the looks or appearance of the defendant  
was admissible. It was touching a fact. How one  
looks is as much a fact as what one says or does.  
*State v. Cross*, 68 Iowa, 180.

VI. Mrs. Hunt testified that, on the Wednesday  
before Mabel was killed, the defendant and Mabel came  
to her house, and he introduced her as his  
6. —: —: wife, and said his name was Hall, and he  
conduct and relations of parties. rented a room; that one day she saw  
Mabel in bed with a man named Kavanagh, and  
that the defendant was disrobed in the same room.  
It was proper to show the relations of the parties.  
Such relations often tend to show motive for the com-  
mission of a crime. *State v. Kline*, 54 Iowa, 183;  
*State v. Schaffer*, 70 Iowa, 371; *State v. Rainsbarger*,  
74 Iowa, 196; *State v. Pugsley*, 75 Iowa, 743.

VII. One Wright was put upon the stand for the  
purpose of contradicting the witness Taylor's state-  
ment as to threats of the defendant to  
7. —: error kill Mabel Swartz. On cross-examination  
cured by instruction. he was asked if he did not in the presence  
and hearing of one Hockersmith, on the day before,  
and in the court room, state that he had known the  
defendant well for the last four years, and that he  
knew of a good many scrapes he had been in, and told  
about his gambling,—about his being a gambler. He  
answered that he did not so state. Hockersmith was  
permitted to testify that Wright did make such state-  
ments to him. Wright had testified in chief, in sub-

stance, that he had not seen defendant for years until a short time before the trial. It was proper, therefore, to show that he had made a statement off of the stand not in accord with his testimony. What was said about the defendant being a gambler, or gambling, or being in scrapes, was wholly immaterial, and was an assault upon the defendant's character which was not in issue. This objectionable matter should not have been admitted, and, if it had rested there, we should be compelled to hold that it was such error as would justify a reversal on that ground. But the court, in an instruction to the jury, excluded from their consideration the objectionable portion of this evidence, and we do not think that the error was prejudicial.

VIII. It is urged that, as Joseph Shephard, the bailiff who had charge of this jury, was not specially sworn, as the law requires, such fact  
8 CRIMINAL LAW:  
jury in charge  
of unsworn  
bailiff: new  
trial. entitled the defendant to a reversal of the judgment. Shephard was appointed as bailiff at the January term, 1892, of the court, and then took the oath. He was reappointed at the April term at which this defendant was tried. He never took an oath with reference to this case. It does not appear what was the nature and conditions of the oath which he took in January, but it may be assumed that it was the same form of oath which is prescribed by law for his principal, the sheriff, as the statute provides that bailiffs shall be regarded as deputy sheriffs. Code, section 341. This is an oath to support the constitution of this state and that of the United States, and to faithfully and impartially, to the best of his ability, discharge all the duties of the office of bailiff. Code, sections 675, 676. Our statute also provides that, if the jury "do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place without meat or drink, water excepted, and not to suffer any

person to speak or communicate with them, nor speak to or communicate with them themselves, unless it be to ask them whether they have agreed upon their verdict, and not to communicate to anyone the state of their deliberation or the verdict agreed upon, until after the same shall have been declared in open court, and received by the court, and to return them into court when they shall have so agreed upon their verdict, unless by permission or order of the court, or they be sooner discharged." Code, section 4442.

The provision of this statute now under consideration is mandatory. The taking of a general oath of office by a bailiff is not a compliance with the law. If the record was silent as to the taking of an oath by the bailiff, we would presume that he had complied with the law, and was properly sworn. *State v. Pitts*, 11 Iowa, 345. But in this case it is made to affirmatively appear that the bailiff was not sworn, as the law expressly requires. We have recently held that the provision of this same section requiring the jury to be kept together is mandatory. *State v. Fertig*, 84 Iowa, 79. In that case the court said: "These sections of the law were not intended as merely directory provisions. They appear to us to be absolute requirements, and we know of no reason why they may be ignored, unless their provisions are waived by the party on trial." The statute is absolute in its requirement that the jury shall be in charge of a sworn officer. It prescribes, as we have seen, the form of oath to be taken by him. No oath in anywise complying with the statutory requirement was taken by this bailiff. The oath provided by law is one of the means of protection which the legislature, in its wisdom, has guaranteed to one on trial for a crime. It is more than a mere matter of

is some conflict in the decisions touching this point, we think by far the greater weight of authority sustains our holding. *Gibbons v. People*, 23 Ill. 518; *McIntyre v. People*, 38 Ill. 514; *Lewis v. People*, 44 Ill. 452; *McCann v. State*, 9 Smedes & M. 465; *Hare v. State*, 4 How. (Miss.) 187; *Commonwealth v. Shields*, 2 Bush, 81; *Brucker v. State*, 16 Wis. 333; *State v. Underwood*, 76 Mo. 630; 1 Bish. Crim. Proc., sections 991, 993; Whart. Crim. Pl., sections 728, 827; 2 Thomp. Trials, section 2548. Some of the cases which hold that a special oath need not be administered to the officer in charge of a jury were decided in states having no statute expressly requiring it. *Davis v. State*, 15 Ohio, 72.

The question then arises, is the failure to take the oath a ground for reversal of this case? The court below could only grant a new trial for some one of the causes provided by the statute. *State v. Bowman*, 45 Iowa, 418; *State v. Lee*, 80 Iowa, 75; *State v. Watson*, 81 Iowa, 380. The statutory grounds for a new trial, in brief, are: (1) Where the trial has been had in the absence of the defendant; (2) when the jury has received any evidence, paper, or document out of court not authorized by the court; (3) where they have separated without leave of court, after retiring to deliberate upon their verdict, or have been guilty of misconduct tending to prevent a fair trial; (4) when the verdict has been decided by lot; (5) where the court has misdirected the jury in a material matter of law; (6) when the verdict is contrary to the law or evidence; (7) when the court has refused to properly instruct the jury; (8) when from any other cause the defendant has not received a fair and impartial trial. Code, section 4489. It is not claimed that the jury were guilty of any misconduct; hence the only ground under which a new trial could be claimed is the eighth. But that can not

the defendant has not had a fair and impartial trial. The bailiff in charge of this jury, so far as the record discloses, performed faithfully every duty which the law enjoins upon such an officer. He could have done no more had he taken the oath provided by law. No prejudice resulted from this neglect of duty. We are not authorized to go outside the statute to seek for grounds for a new trial. We are limited to those expressly given. It is clear, then, that the court did not err in refusing a new trial on this ground.

IX. The third paragraph of the court's charge to the jury reads: "If you have any reasonable doubt whether the defendant is guilty of *any one* of the crimes defined in these instructions, you should return a verdict of guilty of the next lower offense as to which no doubt exists in your minds." The words "*any one*" we have italicized. Counsel for appellant argue that, if the jury had reasonable doubt whether the defendant was guilty of "*any one*" of the crimes defined in the instructions, they should have acquitted the defendant. While we should not be willing to reverse this case for the alleged error in this instruction, in view of what is contained in other paragraphs of the charge, yet, as for other errors a new trial must be granted, it is proper for us to suggest that it is advisable to so frame the instruction on another trial as to avoid the objection urged.

X. It is insisted that the verdict is not sustained by the evidence. As for the refusal of the court to change the place of trial the judgment must be reversed, it would not be proper for us to discuss the testimony; and as a general rule, where a criminal cause is reversed upon another ground, we will not pass upon the sufficiency of the evidence to sustain the verdict, as on another trial it might be different. In this case, however, we think it proper to say that we could not sus-

tain a conviction for murder upon the evidence disclosed in the record before us.

Other errors are assigned to the action of the court in giving and refusing instructions. We think they are without merit. For the reasons heretofore given the judgment below is REVERSED.

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J. W. PRICE, Appellant, v. J. F. HOLCOMB *et al.*,  
Appellees.

1. **Corporations: MEETING OF STOCKHOLDERS: RIGHT TO VOTE SHARES.**

Where one half of the stock in a corporation was issued to B. upon his agreement to pay twenty thousand dollars, to be used in making needed changes in the plant of the company and as working capital, and thereafter certain improvements in the company's works were authorized by the corporation, which were paid for by B., and for which he was allowed by the company nearly seventeen thousand dollars, *held*, that B. being entitled, as fully paid, to such number of shares as the sum thus expended by him would purchase under the terms of said agreement, he had the right to vote such number in a meeting of the shareholders of the corporation, and such shares, with others admitted to be entitled to vote, being a majority of all the stock voted at a shareholder's meeting, a resolution for which B. voted all of the stock held by him, including that not paid for, was legally adopted.

2. ———: **SALE OF CORPORATE PROPERTY: RIGHTS OF MAJORITY.**

Where the business of a corporation had been operated at a loss from the beginning, and its works had been idle for about a year, because, though solvent, it was without the necessary working capital, and was unable to secure it, and no practicable plan for putting them in operation had been suggested, though frequently discussed, and the officers of the corporation were not in accord, and it was apparent that no agreement could be reached by which the company's works could be operated or leased, *held*, that the circumstances justified a sale of the property and business of the corporation by the action of a majority of the shareholders against the protest of a minority.

3. ———: ———: **STOCKHOLDER AS PURCHASER.** A stockholder in a corporation has a right to purchase the corporate property at public sale.

4. ———: ———. Section 1060 of the Code, providing that, "no corporation can be dissolved prior to the period fixed in the articles of incorporation, except by unanimous consent," will not prevent a sale of all the property of the corporation by a majority only of the capi-

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124	119

89	123
138	265

tal stock, when circumstances demand it, even though such sale result in the dissolution of the corporation.

5. ———: ———: STOCKHOLDER AS PURCHASER. The relation of a stockholder in a corporation to the other shareholders, and to the corporate property, is not such as to preclude his becoming a purchaser of the entire corporate property at a public sale thereof.

*Appeal from Des Moines District Court.*—HON. JAMES D. SMYTHE, Judge.

MONDAY, OCTOBER 9, 1893.

THE plaintiff, owner of one seventh of the stock of the Iowa Rolling Mill Company, a corporation under the laws of Iowa, organized for the purpose of rolling and making iron at its works in Burlington, Iowa, prosecutes this action in equity to set aside a sale and conveyance of the works of said corporation to the defendant J. F. Holcomb in pursuance of certain resolutions adopted by the stockholders. A decree was entered dismissing the plaintiff's petition, from which decree he appeals.—*Affirmed.*

*C. L. Poor and Thomas Hedge*, for appellant.

*Power & Huston*, for appellees.

GIVEN, J.—Prior to 1887 the plaintiff and others, residents of Burlington, Iowa, organized a corporation known as the Burlington Rolling Mill Company, with a paid up capital of thirty-six thousand dollars, for the purpose of erecting and operating a rolling mill at Burlington for the manufacture of iron. The works were constructed and operated for a time at a loss. These parties being inexperienced in the business, and the company without sufficient capital, the defendant Richard Brown, of Youngstown, Ohio, a gentleman of experience in the iron business, and possessed of means, was solicited to take an interest in the business, and to associate with him other men of experience to operate

the works. In pursuance of an agreement, the defendant, the Iowa Rolling Mill Company, was incorporated with a capital stock of seventy thousand dollars, and the property of the old company was transferred to it free of debt and incumbrance. Certificates for one half of the capital stock were issued to the stockholders in the old company in lieu of their stock therein, and for the other half to Mr. Brown and his associates, M. C. Williams and E. H. Wilson, of Youngstown, upon Brown's promise to pay twenty thousand dollars, to be used in making needed changes in the works and as working capital. The defendant company, being thus organized, leased the works to Brown and his associates for one year free of rent, and at the end of that year extended the lease for a second. Brown and his associates operated the mill on their own account, but in the name of the corporation and through his treasurer, until in May, 1889, when the buildings were destroyed by fire. The mill was operated at a loss to Brown and his associates. During the second year of the lease the defendant J. F. Holcomb, of Youngstown, purchased nearly all of the stock held by Wilson, and thereafter took part in the management of the business. Certain improvements were authorized to be made on the works during the lease, all of which were made and paid for by Brown and his associates at a cost, as they claim, of seventeen thousand dollars. A committee of the company reported in favor of allowing sixteen thousand, seven hundred and forty-six dollars and ninety-six cents of this claim. The works were rebuilt after the expiration of this lease, but were not operated, because of a failure to agree upon any plan for operating them. While all parties seem to have desired that the works should be operated, no tangible plan was suggested. There was a proposition from one Roberts to pay a royalty on the iron made for the use of the works, but this offer was

indefinite, and gave but little assurance of work being resumed under it. The fact is apparent that such differences had sprung up between the Burlington and Youngstown stockholders that it was not likely that any plan would be agreed upon for leasing or operating the works. The record of the proceedings of the stockholders, as set out in the abstract, is as follows:

“October 7, 1890. Annual stockholders’ meeting (there being present and voting six hundred and eighty seven shares of stock). J. F. Holcomb offered the following resolution, which was seconded and adopted, viz.:

“‘Whereas, the corporation has been organized and in existence for about three years, having its mills ready for operation; and,

“‘Whereas, the entire capital stock of this company, seventy thousand (\$70,000) is invested in the grounds and plant, leaving the company without any working capital; and,

“‘Whereas, the mills were operated for the first two years by Richard Brown and others under a contract, during which time no money was made by such operation, either for Mr. Brown and others or for the company; and,

“‘Whereas, the mills have stood idle ever since October, 1889, this company being utterly unable to set them in motion for want of capital, and during which time the directors have not been able to make any contract or arrangements for the operation of the mills, and in the meantime the property and plant has been largely decreasing in value, and will continue so to do if allowed to remain idle, and, as a result, the stockholders are not only losing the use of their capital invested, but are losing the capital itself; and,

“‘Whereas, the officers and directors do not report any plan or prospect for any arrangement for the operation of the mills during the coming fiscal year,

and the company can not operate them for want of means;'

"Therefore, resolved, that the board of directors of this company be, and they are hereby, directed and instructed to proceed at once and sell the entire property and plant of this company, either at public or private sale, and on such terms as they deem for the best interests of the stockholders, and that they make the sale within the next sixty days; and they are hereby authorized to make, execute, and deliver any and all necessary and proper deeds, contracts, and other instruments in order to effectually carry out and consummate such sale, and, further, that they report their doings in this matter to an adjourned stockholders' meeting.

"Resolved, further, that when this meeting is adjourned, it adjourn to meet on the eighth day of November, 1890, at three o'clock P. M., to transact such business as may then seem proper, and, further, that the directors make report at that meeting of the prospects of sale or other disposition of the property, and that no actual sale be made previous to that date, unless pursuant to some other action of the stockholders.'"

"October 7, 1890. Board of directors' meeting. 'Whereas, the stockholders of this company, at their annual meeting, October 7, 1890, by a resolution there offered and adopted, directed and instructed the directors of this company to proceed at once and sell the entire property and plant of this company, either at private or public sale; and,

"Whereas, the sale, by the resolution, must be consummated within sixty days from October 7, 1890; and,

"Whereas, on account of approaching winter, it is desirable to make such sale as early as possible, to enable the purchaser or purchasers to make necessary improvements and repairs;

“‘Therefore, resolved, that the president and secretary of this board be, and they are hereby, directed and instructed to proceed at once, and solicit offers and enter into negotiations for the sale of the entire property and plant of this company, by advertising the same at their discretion in at least two of the leading iron trade papers of this country, and otherwise, as they may deem advisable, and that they make a full report in relation thereto to this board at some appropriate time, prior to the adjourned annual stockholders’ meeting, to be held November 8, 1890.’

“‘To which J. W. Price offered the following substitute, which was also seconded, viz.:

“‘Resolved, that the board of directors proceed at once to make the necessary arrangements for putting the Iowa Rolling Mills into operation, under the management of its own officers, at the earliest practicable time.’

“‘Substitute lost, and the original motion carried.’”

The minutes of an adjourned meeting of the stockholders of the Iowa Rolling Mill Company held on November 8, 1890:

“J. F. Holcomb offered a resolution that the board of directors are hereby instructed to proceed at once and sell at public sale the mill, premises, and entire property and plant of this corporation; terms of sale, half cash, and the balance in six and twelve months from date of sale, with six per cent. interest per annum with good security. Mr. Guelich offered an amendment providing that no bids should be entertained at said sale for less than seventy-five cents on the dollar of the stock. Mr. Huston moved to amend the amendment by striking out ‘seventy-five cents on the dollar,’ and inserting ‘twenty-five thousand dollars.’ Mr. Huston’s amendment was carried; Price, Guelich and Gear voting ‘No,’ and the resolution, as amended, was carried by the following vote: Ayes: Richard Brown, by Hol-

comb, one hundred and seventy shares; E. M. Wilson, by Holcomb, ten shares; J. F. Holcomb, one hundred and seventy seven and one half shares; J. G. Foote, fourteen shares; C. J. Ives, by Foote, seventeen shares; E. S. Huston, five shares; total, three hundred and ninety-three and one half shares. Noes: J. W. Price, one hundred and one third shares; Price & Wiese, by Price, eight shares; Theodore Guelich, sixty nine and one third shares; J. H. Gear, seventy-eight and one third shares; Mrs. H. F. Gear, by Guelich, twenty-eight shares; Horace Rand, by Guelich, five shares, total, two hundred and eighty-two shares. Mr. Price objected to any stock being voted that had not been fully paid for, and ruled that no such stock be voted, but his ruling was not sustained. 'The undersigned stockholders protest against the resolution offered by J. F. Holcomb, and adopted, to sell the property of this company at public sale on December 13, 1890, the limit to the price being entirely too low, in our estimation. [Signed] Theo. Guelich, H. F. Gear, by Guelich. H. S. Rand, by Guelich. John H. Gear. J. W. Price.' Adjourned to meet December 12, 1890. J. F. Holcomb, Secretary.

"Dec. 12, 1890. Adjourned stockholders' meeting. After some general discussion as to the condition of the property and the prospects of selling, Mr. Holcomb offered the following resolution: 'There being no offers for the property and plant of this company at private sale, and no offers to lease the same which are acceptable to the majority interest, therefore, be it resolved, that the board of directors be, and they are hereby, instructed and directed to proceed and sell the same at public sale on the thirteenth instant, as advertised, and to this end the president and secretary are hereby instructed and directed to attend the sale, procure the services of a suitable person as auctioneer, and are charged with the duty and responsibility of seeing that

the orders of this company in the matter are carried out. Resolved, further, that when this meeting adjourns it adjourn to meet on Saturday, December 20, 1890, at three o'clock P. M., to receive the report of the sale, and to transact any other business which may then come before the meeting.' Which resolution was adopted by a vote of three hundred and seventy-six and one-half shares for and two hundred and eighty-two against."

"Dec. 20, 1890. Adjourned stockholders' meeting. J. F. Holcomb then offered the following resolution: 'There having been no bids for the property and plant of this company at the public sale of the same, advertised to take place at the courthouse door this day at two o'clock P. M., and said sale having been adjourned to take place on Saturday, the twenty-seventh instant, at the same hour and place, said action is hereby approved, and the president and secretary are hereby authorized and directed to attend and conduct said sale, advertising the same in the local papers. It is further ordered that, when this meeting adjourns, it be to meet on Saturday, the twenty-seventh instant, at three o'clock P. M., at which time the president and secretary are hereby ordered to make report of said sale.' Which resolution was adopted by a vote of three hundred and seventy-six and one half for, and one hundred and seventy-two and two thirds against."

At the meeting, to wit, December 27, 1890, the stockholders, by a vote of three hundred and seventy-six and one half shares for, and one hundred and seventy-two and two thirds shares against, adopted the following:

"Mr. Huston also submitted the following order: 'The property and plant of this company having been this day sold at public sale to John F. Holcomb for twenty thousand dollars, pursuant to orders and directions of this company, and there being no prospect of making a more favorable sale, and, owing to appar-

ently irreconcilable differences between the stockholders, there being no prospect of putting the mills in operation under any plan which would offer any substantial return to the stockholders, it is, therefore, ordered that said sale be, and the same is hereby, approved and confirmed, and the president and secretary are hereby authorized and directed to execute the proper deed and other papers, and complete said sale, according to the terms authorized: Provided, however, that, such sale having been made to a stockholder of this company, it shall not be completed for eight (8) days from this date, and if, during that time, any *bona fide* bid of not less than five hundred dollars in excess of the above bid be received by the president and secretary, then said property shall again be offered at public sale at an adjourned meeting of this stockholders' meeting, to be held at the office of Guelich & Blanke on Monday, January 5, 1891, at three o'clock P. M., and the property then sold to the highest bidder, according to the terms heretofore advertised, and said sale at once perfected and completed; but, if no bid of an increase of five hundred dollars is so received, then the sale to John F. Holcomb for twenty thousand dollars shall at once be completed and perfected, and the necessary papers executed and delivered.' 'On behalf of himself as the holder of sixty-nine and one third shares of the stock, J. H. Gear, Mrs. H. F. Gear, and H. F. Rand, holding seventy and one third, twenty-eight, and five shares of stock, respectively, for whom he has a proxy, the undersigned hereby protests against the pretended sale of the property and plant of the company, and against the consummation thereof, for the reasons, first, that the stockholders, under our articles of incorporation, have no authority to act in the premises; second, that the stock not paid for has no right to vote in a stockholder's meeting. Burlington, Iowa, Dec. 27, 1890. Theo. Guelich."

"Jan. 5, 1891. Adjourned stockholders' meeting. Mr. Huston offered the following order: "There being no further or better offer for the property and plant of this company over and above twenty thousand dollars, as bid by John F. Holcomb at the public sale held December 27, 1890, it is now ordered, that the sale to him at that price be, and the same is hereby, approved and confirmed, and the president and secretary are hereby directed to execute the proper deed thereof, and deliver the same to said John F. Holcomb, on his making payment therefor according to the terms of sale, to wit, one half cash, and the balance in six and twelve months from date of sale, at six per cent. interest with good security.' Which order was adopted by a vote of three hundred and seventy-six and one half shares for, and one hundred and seventy-two and two thirds against."

And at the same meeting the following order was offered:

"It appearing that a proper deed for the property and plant of this company to John F. Holcomb, in accordance with the sale made to him, as appears on the records of this company, has been submitted to J. W. Price, president of this company, for his signature, and he having refused to execute it, it is now ordered that the secretary be, and he is hereby, instructed and directed to take such steps as may be necessary, including employing counsel and instituting legal proceedings in the name and on behalf of the company, to compel the execution of such deed by the president, as ordered by this company," which order was adopted by the same vote.

It was upon the authority of these resolutions that the sale in question was made and confirmed to the defendant Holcomb. The plaintiff being president of the company, and refusing to execute a deed to Holcomb, proceedings were had whereby Mr. Brown, as

vice-president, was authorized to, and did, execute a deed to Holcomb, which was approved by the board of directors, March 31, 1891. This action having been commenced January 2, 1891, the board of directors, at its meeting March 30, 1891, ordered as follows:

"It is further ordered that upon said purchaser filing with the treasurer the written consent of not less than three fourths ( $\frac{3}{4}$ ) in amount of the stock of this company, that the deed to him shall be delivered, without requiring payment in cash or notes, as provided by the terms of sale, and an obligation signed by himself and Richard Brown, of Youngstown, Ohio, that they will, when requested by this board, pay over to the treasurer the *pro rata* share of the proceeds arising from said sale, which shall then be coming to such stockholders as have not given their written consent as aforesaid, said deed shall be at once delivered to the purchaser, John F. Holcomb."

The written consent of stockholders and the obligation of Holcomb and Brown were executed as required by this order, and through inadvertence were retained by Holcomb, as secretary, instead of being filed with the treasurer. Upon the execution of these instruments the deed in question was delivered, and Holcomb took possession of the works.

I. The articles of incorporation of the defendant company provide, that the capital stock shall all be paid

up, "and that every stockholder shall be entitled to one vote for every share of stock so held." It will be observed that

the stock issued to Brown and his associates was voted in favor of their resolutions authorizing and confirming the sale and conveyance to Holcomb, and was necessary to constitute a majority. The appellant contends that Brown had not paid the twenty thousand dollars in cash, as agreed, and, therefore, said stock was not paid for and not entitled to be voted.

1. CORPORATIONS:  
meeting of  
stockholders:  
right of vote:  
shares.

That stock was issued with the consent of all the stockholders, by the plaintiff as president, upon Brown's promise to pay the twenty thousand dollars for the purpose expressed. If this was all that appeared, it might well be questioned whether Brown's obligation to pay the twenty thousand dollars was not a payment for the stock, within the meaning of the articles. We have seen, however, that Brown had paid at least sixteen thousand, seven hundred and forty-six dollars and ninety-six cents of the twenty thousand dollars for improvements authorized, as he had agreed to do. It is certainly clear that Brown was entitled to credit on the twenty thousand dollars for the amount thus paid, and to that extent the stock was paid for.

It is argued that nothing less than a full payment of the twenty thousand dollars was a payment for any part of this stock. The stock was in shares of one hundred dollars each, and, while this might be true as to a fraction of a share, it is certainly not as to the three hundred and fifty shares. Mr. Brown was entitled to a share as fully paid up as soon as he had paid the agreed price thereof. The amount paid entitled him to at least two hundred and ninety-three shares. The highest number of shares voted against either of the resolutions was two hundred and eighty-two, while all the Brown stock and forty-three and one half shares of other stock, admitted to have been paid for, were voted for the resolutions. Counting the Brown stock at two hundred and ninety-three, there was a clear majority of paid up shares in favor of each of said resolutions. During the time the works were operated under the lease, it was in the name of the corporation, with the knowledge and consent of all the stockholders. All money was received and paid through the treasurer, and the president made some of the operating contracts. Brown paid more than the price of his stock into the treasury for operating expenses, and thus became

entitled to an accounting with the company as to the twenty thousand dollars and the money so paid. The stock issued to Brown and his associates was continuously voted at all meetings with the knowledge of all the stockholders, without objection, until the protest mentioned above. We can not say, with the light of all these facts, that the resolutions authorizing and confirming the sale were not adopted by a legal majority of the stock voted.

II. It is unquestionably true that a private corporation holds its property as a trust fund for the stockholders, and that, when a majority of the stockholders act together, they are in a sense the corporation, and must act with due regard to the right of the minority. If the majority decide arbitrarily, and without just cause, to sell the property of the corporation to the prejudice of the minority, and thereby compel the winding up of the business of the corporation, it is a fraud upon the minority, and courts of equity will interfere. If, however, just cause exists for selling the property, as when the corporation is insolvent, and the sale is necessary to pay debts, or where, from any cause, the business is a failure and an unprofitable one, and the best interests of all require it, the majority have clearly power to order the sale, and in such case their acts are not *ultra vires*. Cook on Stockholders & Corporation Law, sections 656, 662, 667. In this last section it is said: "If, however, the corporation is an unprofitable and failing enterprise, then a sale of all the corporate property with a view to dissolution may be made by the majority of stockholders." It would be a harsh rule that would permit one stockholder to hold the others to their investment when just cause existed for closing the business of the corporation. *Lauman v. Lebanon Valley R'y Co.*, 30 Pa. St. 42. In *Sawyer v. Dubuque Printing Co.*, 77 Iowa, 242, this

2 —: sale of  
corporate  
property:  
rights of  
majority.

court recognized the right of the majority of stockholders to make sale of all the corporate property when just cause existed for so doing, and held, under the facts of that case, that the sale was warranted, and was not a fraud upon the minority. The appellant cites at length from *Ervin v. Oregon R'y & Navigation Co.*, 27 Fed. Rep. 625. In that case there was no claim of necessity for the disposition of the corporate property that was made. It is said: "Plainly the defendants have assumed to exercise a power belonging to the majority in order to secure personal profit for themselves, without regard to the interests of the minority. They repudiate the suggestion of fraud, and plant themselves upon their right as a majority to control the corporate interest according to their discretion." It was plainly held that a court of equity would not tolerate a discretion that did not consult the interest of a minority. The right of a majority to wind up the affairs of a corporation like this, and dispose of its assets, even against the objections of a minority, when the business could no longer be advantageously carried on, is recognized. See *Hayden v. Official Hotel Red-Book and Directory Co.*, 42 Fed. Rep. 875, a case similar in many of its facts to this, and in which the rule just announced was recognized.

† We must look to the facts, and see if the action of the majority in ordering the sale in question was warranted by the circumstances. The enterprise was a new one in Iowa. The works had been operated at a loss from the beginning. They had been idle for about one year. The corporation, though solvent, was without the necessary working capital, and unable to secure it. No tangible plan for operating the works was suggested, though the subject was frequently discussed. True, after the adoption of the first resolution to sell, it was proposed to lease to Mr. Roberts, but, as already stated, his offer was indefinite, if it may be

called an offer, and afforded no reasonable ground for expecting that the works could thereby be put in operation. We are inclined to think that this plan was presented by the minority for the purpose of preventing the sale ordered, rather than from any hope of starting the works under it. A marked disagreement had sprung up between the plaintiff and the defendant, Holcomb, neither being willing for the corporation to assume business with the other in even partial control. The Burlington stockholders mainly took sides with the plaintiff, and the Youngstown stockholders with Holcomb. It was apparent that no agreement could be reached by which the works could be operated or leased. No alternative was apparent but to leave the works to rust and decay in idleness, or to sell them. We think the circumstances fully justified the action of the majority in authorizing a sale of the works.

The appellant cites section 1066 of the Code, which + provides as follows: "No corporation can be dissolved prior to the period fixed in the articles of incorporation, except by unanimous consent, unless a different rule has been adopted in their articles." It is contended that, as the articles fixed twenty years, a sale of all the property, that necessarily terminated the business, could not be made, except by unanimous consent. The sale of all the property may have the effect of terminating the business for which the corporation was organized, but it does not dissolve it. Such a sale no more dissolves the corporation than would the giving of a mortgage that might ultimately result in all the property being taken from the corporation. *Buell v. Buckingham*, 16 Iowa, 284, 296. This corporation still exists, and is properly made a party to this action as an existing corporation. It is certainly not the purpose of section 1066 to perpetuate the existence of corporations when circumstances arise demanding their dissolution. Hence, if the sale of the property was necessary, the

right to make it would not be defeated, even if it had the effect of dissolving the corporation. Section 1066 applies when no circumstances arise that defeat the purpose for which the corporation was organized, and that require an earlier dissolution.

III. The appellant cites cases announcing the familiar rule that a party holding a fiduciary relation to trust <sup>a. —; —;</sup> <sub>stockholder as purchaser.</sub> property can not become a purchaser thereof, either directly or indirectly. It is contended that the defendant Holcomb, in voting the majority of the stock, as already stated, stood in the place of the corporation, and was charged with its trust relation toward the stockholders, and, therefore, within the rule forbidding him from purchasing the property. Mr. Holcomb's relation as a stockholder was not that of agent or trustee, but a joint owner. An agent or trustee is charged with the interests of his principal or *cestui que trust*, and can not have any interest adverse thereto. Not so, however, as to a stockholder. He has his own interests to protect, and is not charged with the care of the interests of the other stockholders. They act for themselves. The rule applicable to stockholders is well stated in *Rice's Appeal*, 79 Pa. St. 204, as follows: "Where a person has the actual control of a corporation, whether such control arises from the ownership of a majority of the shares, or from his position or influence, he is held to most rigid good faith. The onus is upon him to show the fairness of the transaction if it is called in question." This brings us to inquire whether the appellee Holcomb acted in good faith. It is unnecessary that we extend this opinion by here discussing the evidence on this point. It is sufficient to say that purchasers for such property were not numerous, the sale was advertised and open, it was postponed in hope of securing bidders, the minimum price was fixed, and at an open sale the appellee Holcomb made his bid. It is true that the price bid

was much less than the cost of the property, but it was all it would bring at an open sale, and, in view of the past failures of this new enterprise, may be said to be equal to the then value of the property. We find no evidence of fraud or bad faith in the transaction. What was done was authorized by the circumstances, and was done in good faith, and for the best interests of all concerned.

The judgment of the district court is **AFFIRMED**.

**THE STATE OF IOWA, Appellee, v. IRWIN MCINTIRE,**  
**Appellant.**

1. **Seduction: TIME: CONFLICT OF EVIDENCE: EFFECT.** Where in a prosecution for seduction it was shown, by the testimony of several witnesses, that the parties were not together on the day named by the prosecutrix as the time of the commission of the act, but the evidence did not indicate that it must have been on said day or not at all, nor that if not on such day that the testimony of the prosecutrix was entirely unworthy of credit, *held*, that there was not such a failure of evidence as would warrant the court in setting aside a verdict against the defendant.
2. ———: **CHASTITY OF PROSECUTING WITNESS: EVIDENCE.** The fact that the prosecuting witness in such case allowed her male friends, when escorting her home on the first occasion, to hug and kiss her, is not conclusive evidence of unchastity.
3. ———: **INSTRUCTIONS TO JURY.** The refusal of the district court, upon request, to give instructions to the jury embodying correct propositions of law, and applicable to the case, is not erroneous where such instructions are substantially embodied in the charge of the court.
4. ———: **PERSUASIVE ARTS: INSTRUCTIONS TO JURY.** It appearing from the evidence that the defendant hugged and kissed the prosecutrix, told her that there would be no harm in the act, that other girls had yielded to him without the promise of marriage, and that he would marry her whether or not anything happened to her, and the prosecutrix having testified that it was because of this, and the defendant's promise to marry her, that she submitted to him, *held*, that the evidence warranted an instruction to the jury that they should find the defendant guilty if they found that he induced her to yield to him by a promise of marriage "or by the use of other seductive arts."

89	139
121	116
89	139
121	9
89	139
35	730

5. **New Trial: MISCONDUCT OF COUNSEL IN EXAMINATION OF WITNESSES.**

In a criminal prosecution for seduction the defendant's brother-in-law having testified in behalf of the defendant, was questioned on cross-examination by the state's attorney as to his relation to the defendant, and was then asked, "You made him marry her, didn't you?" to which question an objection was sustained. *Held*, that while the question was inexcusable, yet that the question, as to whether prejudice resulted therefrom, was for the district court, and that the cause would not be reversed after the refusal of that court to grant a new trial, when its discretion was fairly exercised.

*Appeal from Monroe District Court.*—HON. H. C. TRAVERSE, Judge.

MONDAY, OCTOBER 9, 1893.

INDICTMENT for seduction. There was a verdict of guilty, and a judgment thereon, from which the defendant appeals.—*Affirmed*.

*J. C. Mabry, Ed. Morrison, and D. H. Anderson,* for appellant.

*Fred Townsend, McCarhan & Richmond, John Y. Stone,* Attorney General, and *Thos. A. Cheshire,* for the State.

GRANGER, J.—There is a claim that the verdict has not sufficient support in the testimony. We think it

such as to forbid our interference. In  
1. Seduction: time: conflict of evidence: effect. fact, it has stronger support than many cases that have been affirmed in this court.

That the defendant had sexual intercourse with the prosecutrix is hardly a doubtful question. The principal contention as to facts is as to the time of the intercourse and the previous chastity of the prosecutrix. Great importance is attached by the appellant, in argument, to the fact that her testimony fixed, as the time of the intercourse, the twenty-seventh day of August, while the testimony of several other witnesses shows that the parties were not together on that day.

Of course, the particular time of the intercourse may be important in determining the fact of seduction, that is, the truth of the statements made by the prosecutrix, but it is not essential to sustain a conviction, and the court so instructed the jury. The testimony of the prosecutrix shows a continued courtship between herself and the defendant of some months, covering a period both before and after the twenty-seventh day of August, which she quite positively fixes as the day of their intercourse. Taking her testimony together, it does not appear that she is absolutely positive as to the exact time, but it is said by her that it was in August. The record is by no means a showing that the act was on that particular day, or not at all; nor does it present a state of facts showing that, if it was not on that particular date, her testimony is entirely unworthy of credit.

II. The argument makes quite conspicuous certain acts of the prosecutrix as indicating a want of chastity on her part, and to such an extent, it is urged, as to overcome the finding of the jury. We do not concur in this view.

If we agree with counsel that her acts were indiscreet, or even such as might awaken suspicion, still they do not rise to the importance claimed for them in argument. The testimony shows that at times, when escorted home by a male friend, and on the first occasion, she permitted them to "kiss her good night," and it is said she went so far as to allow them to "hug her." It is for conduct of this character that her unchastity is urged. We have said that no particular amount or degree of such manners or conversations can be set down as conclusive evidence of an unchaste character. *State v. Andre*, 5 Iowa, 389; *Same v. Hemm*, 82 Iowa, 609.

III. The defendant asked the following instruction: "You are instructed that it is natural, and to be

2. —: instruction to jury. expected, that the prosecutrix should, as far as possible, shield herself, and cast the blame, if any there was, on the defendant. You should not, therefore, put any constrained construction upon her language in order to find the defendant guilty. On the contrary, as the defendant is entitled to the benefit of all reasonable doubt there may be as to his guilt, the language of the prosecutrix should receive no other construction than its natural and fair meaning may entitle it to." The court refused it, and gave the following: *Second.* Counsel for defendant claim that in construing the testimony of the prosecuting witness it may be assumed that she would naturally desire to screen herself, and throw the blame on defendant, so far as she could reasonably do so, and therefore no strained construction should be given to her words in order to convict defendant. You are instructed that this is true. But you are also instructed that, should you find the prosecuting witness to be a credible witness, then, in construing her testimony, you should give her words a fair and reasonable construction." The import of the instructions is much the same, and that given was all the defendant could reasonably ask.

IV. The defendant asked an instruction to the effect that the state relied "wholly upon an alleged promise of marriage as the means of seduction," and that there could be no conviction unless such fact was proved. The court did give it, but instructed the jury somewhat generally as to the seductive arts, including a promise of marriage, and said: "If you find that he overcame her virtue and induced her to yield and submit to his embraces by a promise of marriage, or by the use of other seductive arts, then, and in that event, you should find the defendant guilty." The words "or by other seductive arts" have some support in the evidence. The prosecutrix, in her testimony, after saying that he hugged and

4. —: persuasive arts: instruction to jury.

kissed her, and told her there would be no harm in the act, that other girls had yielded to him without the promise of marriage to them, and that he would marry her whether or not anything happened to her, said: "It was that and his promise to marry me in two weeks afterwards that I submitted to him." We think there was no error in the action of the court.

V. It appears that the defendant is the husband of a sister of one Huxford, who was a witness for the

5. New trial:  
misconduct of  
counsel in  
examination of  
witnesses.

defendant. On cross examination he was asked if he was not a brother-in-law of the defendant, and he answered that he was.

Counsel for the state then asked: "You made him marry her, didn't you?" The court sustained an objection to the question, but it is urged that, even though the answer was excluded, the question was so prejudicial as to warrant a reversal because of misconduct on the trial. What would have been our holding had the district court so held, we should not now determine. It is said that the question "is without excuse or warrant of law," and in that view we entirely concur, and we would gladly aid the district court in any proper measure tending to the suppression of such a practice. We are, however, of the opinion that the question of whether prejudice resulted was for the district court, who, being present, could better know the effect of such conduct, and that we should not reverse the case after its refusal to grant a new trial when its discretion is fairly exercised.

We discover no prejudicial error in the record, and the judgment is **AFFIRMED**.

LEGGETT & MEYER TOBACCO COMPANY, Appellant, v.  
COLLIER, ROBERTSON & HAMBLETON *et al.*,  
Appellees.

1. **Chattel Mortgage: DEFECTIVE ACKNOWLEDGMENT: POSSESSION OF MORTGAGEE: NOTICE.** A chattel mortgage which is defectively acknowledged is not for that reason invalid as to third parties, where the mortgagee is in actual possession of the property.
2. **Practice: INSTRUCTION: DIRECTING VERDICT: NEED NOT BE IN WRITING.** An instruction to the jury in a cause to return a verdict as directed, need not be in writing; such direction not being an instruction within the meaning of sections 2784 to 2789 of the Code.
3. **Sales: DELIVERY: ORDER OF VENDEE SUBSEQUENTLY COUNTERMANDED.** Where, after an order for goods is accepted and acted upon by the vendor, by delivering the same to a railroad company for carriage, the vendee countermanded the order, but the countermand was not consented to by the vendor, and the goods were afterwards received by the vendee, and subsequently mortgaged by him as his own property, *held*, that the title to the goods passed to the vendee upon delivery to the carrier, and became complete, as against any right of the vendor to recall the same, upon the acceptance thereof by the vendee, and that the vendor could not thereafter recover possession of the same as against the mortgagee under said mortgage.

*Appeal from Lee District Court.*—HON. J. M.  
CASEY, Judge.

MONDAY, OCTOBER 9, 1893.

ACTION of replevin. There was a verdict and judgment for defendants, and the plaintiff appeals.—*Affirmed.*

*Craig, McCrary & Craig*, for appellant.

*F. T. Hughes* and *James C. Davis*, for appellees.

KINNE, J.—The plaintiff, a corporation, was a manufacturer of tobacco in St. Louis, Missouri. The defendants Collier, Robertson & Hambleton were a firm of

wholesale grocers, residing and doing business in the city of Keokuk, Iowa. At and prior to December, 1890, said firm had placed a standing order with the plaintiff for shipment of thirty-five boxes of "Star" tobacco on every Monday morning. A shipment was made to said firm in accordance with said order on Monday, December 8, 1890. On said day, and after the shipment had been made, the plaintiff received the following letter from said firm, dated the sixth of December, 1890: "Gents: Please omit our shipment of this week on Star tobacco, and follow next week as usual, and oblige yours, etc., Collier, Robertson & Hambleton." The plaintiff at once wrote to said firm that the tobacco had been shipped before the receipt of their letter, and said they would omit the next week's shipment. No reply was received to this letter. The tobacco arrived in Keokuk on December 9, 1890, and was delivered to said firm at their store. On December 10, 1890, the defendant firm executed to the defendant Smith, trustee, two chattel mortgages on all property of the firm, to secure certain creditors in the aggregate sum of about eighty-three thousand dollars. The trustee on the same day took possession of all the property covered by the mortgages, including the tobacco in controversy. Thereafter the plaintiff began this action, and replevied said tobacco. Under the direction of the court, the jury returned a verdict for the defendant Smith, trustee.

I. It is insisted that the mortgages under which the defendant trustee holds the goods are void, because the acknowledgments thereto are defective.

1. CHATTEL MORTGAGE: defective acknowledgment: possession of mortgagee: notice.

The acknowledgment to the first mortgage recites that on December 10, 1890, before the notary, "personally appeared Collier, Robinson & Hambleton, by Hugh Robertson, of said firm, personally known to me to be the identical person who signed the name of the said firm to the

above mortgage as mortgagors, and to be a member of said firm, and acknowledged the execution thereof to be the voluntary act and deed of said firm, for the uses and purposes therein expressed; and also on the same day the other members of said firm acknowledged the execution of said instrument to be the voluntary act and deed of said firm." The acknowledgment of the second mortgage recites that before the notary "personally appeared Collier, Robinson & Hambleton, by each one of said firm, and who are personally known to me to be the identical persons who signed the mortgage, and to be a member of said firm, and one of whom signed the name of said firm to the above mortgage as mortgagors, and acknowledged the execution thereof to be the voluntary act and deed of said firm, for the uses and purposes therein expressed."

For the purposes of this action it is not material whether the acknowledgments were defective or not, since the instruments were the act of the partnership, and, as between the parties thereto, were valid without any acknowledgment, and inasmuch as it appears without dispute that the mortgagee, trustee, took actual possession of all the property covered by said instruments several days prior to the commencement of the plaintiff's action. The effect of an acknowledgment would be to entitle the mortgages to be filed for record and recorded, when they would be notice to the world. The same purpose is accomplished if the mortgagee actually takes possession of the property. There can be no better notice to a claimant of property which is chattel mortgaged than the fact that the mortgagee is in possession of it. "If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody if it was previously valid between the parties, although it be not acknowledged or recorded, or the record be ineffectual by reason of any

irregularity. The subsequent delivery cures all such defects, and it also cures any defect there may be through an insufficient description of the property. The taking possession is an identification and appropriation of the specific property in the mortgage." Jones on Chattel Mortgages, section 178; Cobbey on Chattel Mortgages, section 626; *Fromme v. Jones*, 13 Iowa, 474; *Gaar v. Hurd*, 92 Ill. 326.

II. After the introduction of the testimony, the court orally directed the jury to return a verdict for the defendant. Exceptions were taken because the direction was not in writing. Such a direction is in no sense an instruction, such as is contemplated by Code, sections 2784-2789, inclusive. *Stone v. C. & N.W. R'y Co.*, 47 Iowa, 82; *Milne v. Walker*, 59 Iowa, 186; *Young v. Burlington Wire Mattress Co.*, 79 Iowa, 419.

III. The main question involved in this case is, in whom was the title or right of possession to the tobacco when the writ in this action was served? If by reason of the acts of the parties the title to the tobacco passed to defendant firm, then the trustee was the rightful holder of it when this action was commenced, and the court below properly directed a verdict for him. The order for the tobacco having been accepted, and acted upon by the plaintiff, by delivering the goods to the railway company for carriage to the defendant firm, it was not within the power of said firm to successfully countermand it by any notice, no matter when mailed, which did not reach the seller prior to the delivery of the goods to the carrier. Such delivery, prior to the countermand of the order, vested in the defendant firm the title to the goods, subject to the exercise of the right of stoppage in transit by the seller. So long as the order had not been accepted by a delivery of the goods to the carrier, it might be countermanded; not so,

2. PRACTICE: directing verdict: need not be in writing.

3. SALES: delivery: order of vendee subsequently countermanded.

however, after the act of acceptance was complete. In the case at bar there was no undertaking by the vendor to deliver the goods at the place of business of the defendant firm, nor did the vendee designate a special carrier by whom the delivery should be made. In the absence of such designation and undertaking, the rule is that a delivery to the common carrier, in the usual and ordinary course of business, transfers title and possession of the property to the vendee, subject, as we have said, to the exercise by the vendor of the right of stoppage in transit. *Garretson v. Selby*, 37 Iowa, 529, 531; *Alsberg v. Latta*, 30 Iowa, 442, 445; *Whitlock v. Workman*, 15 Iowa, 351, 354; Benjamin on Sales [Bennett's Ed. 1892], section 181; 21 Am. & Eng. Encyclopedia of Law, pp. 497-499, 529; *Sarbecker v. State*, 26 N. W. Rep. (Wis.), 542; *Falvey v. Richmond*, 13 S. E. Rep. (Ga.), 261; *McLaughlin v. Marston*, 47 N. W. Rep. (Wis.), 1058; *Bacharach v. Chester Freight Line*, 19 Atl. Rep. (Pa. Sup.), 409; *Kessler v. State*, 44 N. W. Rep. (Minn.), 794. *Sullivan v. Sullivan*, 70 Mich. 583, 38 N. W. Rep. 472, was a case where the plaintiff, a manufacturer of liquors at Frankfort, Kentucky, and having a wholesale house at Cincinnati, Ohio, took an order orally while in Michigan for two barrels of whiskey. He sent the order to his distillery at Frankfort, and it was shipped from there to Ryan & McCarney, at Detroit, Michigan. The whiskey was shipped February 19, 1887. February 26, 1887, the firm telegraphed the plaintiff: "Cancel order. Will explain by mail." The plaintiff responded: "Goods were shipped the twenty-first. Receive, and wait further advice." No other communication passed between the parties till the goods were disposed of. The whiskey arrive in Detroit in due time. The consignees paid the freight, and placed the whiskey with their stock. March 9 the defendant, who held an account against the consignees for two hundred and fifteen dol-

lars, purchased the whiskey for two hundred and twenty dollars, receipting his account and paying five dollars in addition, and took the whiskey. He purchased in good faith, and without notice that there was any claim against the property. After the sale, one of the consignees caused a telegram to be sent the plaintiff that consignees had failed. The plaintiff sued in trover for the conversion of the whiskey. It was held that the sale was completed; that a "verbal order, followed by delivery and acceptance, is enough, under the statute of frauds, to complete the sale."

In the case at bar the attempted countermand of the order was a recognition of the existence of the order to ship. The testimony shows that the goods were in fact received at the store of the defendant firm, and treated the same as other goods. There was no act of the firm, after they must have known that the goods had in fact been shipped prior to the receipt of their letters, which tended to show that they did not consider and treat the tobacco as their property. Again, there is nothing to show that prior to the time the plaintiff became aware that the defendant firm had failed it made any claim to the goods. It did not recognize the countermand of the order as in any way binding.

It is said that there was no acceptance of the goods, and hence the case is within the statute of frauds. Under our statute, the delivery of goods under a contract of sale, to a common carrier in the usual course of transportation, is sufficient to take the case out of the statute. Code, sections 3663, 3664. In this respect our statute seems to be different from that of New York, where both delivery and acceptance are required. We think, however, that the evidence shows an acceptance of the tobacco. When the tobacco came to the store, the shipping clerk of the firm was aware of the fact, and knew that the order for it had

been countermanded. The firm, with knowledge that the tobacco had been delivered to it, took no steps to return the same, but the next day exercised an unequivocal act of ownership over it by mortgaging it to the defendant trustee. If the defendant firm did not consider it their property, if they had not accepted it, why did they mortgage it? They thereby undertook to make a disposition of it absolutely inconsistent with any claim that they had not accepted the property. Thus we see that both the plaintiff and the defendant firm treated the transaction as a sale and delivery of the tobacco.

Under our view, we need not consider the error based on the refusal of the lower court to give instructions asked by the plaintiff. They were properly refused. It can not be doubted that, the tobacco having been shipped in pursuance of an order before that time made, and having been received, accepted and retained by the defendant firm, said firm are liable to the plaintiffs for its value, notwithstanding the attempted countermand of the order, which was never recognized by the plaintiff. It is apparent, then, that when the writ was served in this action the plaintiffs had no right or title to or interest in the tobacco. The court below properly directed a verdict for the defendant Smith. **AFFIRMED.**

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CLENDENEN BOGGS, Appellant, v. ARCHIE DOUGLASS,  
Executor, *et al.*, Appellees.

1. **Attachment: LIEN: EQUITABLE INTEREST IN REAL ESTATE: SUPPLEMENTAL PROCEEDINGS: ERRONEOUS DESCRIPTION: EFFECT.** Where the levy of an attachment upon real estate, previously conveyed by the attachment debtor in fraud of creditors, was followed by supplemental proceedings for the enforcement of the attachment lien, in which the petition by mistake described the property as in township seventy-three, instead of township seventy-two, the correct description, and this error was carried into the decree in such proceeding,

89	150
195	676
39	150
105	345
89	150
106	729
89	150
100	480

which was intended to set aside said conveyance for fraud, and a sale was had thereunder to satisfy the judgment in the attachment proceeding, *held*, that the purchaser at said sale acquired no title to said property, nor any right to redeem from an execution sale thereof under a senior judgment, and that he was not entitled to have the error in said decree corrected in a court of equity, and the sale thereunder made effective as against a judgment creditor of said fraudulent grantor, who had redeemed from the sale under said senior judgment by payment of the necessary amount into court.

2. **Appeal:** QUESTIONS CONSIDERED BY THE SUPREME COURT. Upon an appeal from a part only of a decree in equity, the supreme court will not consider objections raised by the appellee to that part of the decree from which no appeal has been taken.
3. **Judicial Sale:** REDEMPTION: FULL PAYMENT REQUIRED. Payment to the clerk of the court, by the owner of premises sold under execution, of a sum less than the amount paid by the holder of a sheriff's certificate, with interest and costs, will not be effectual as a redemption.
4. ———: DEED: RIGHT TO POSSESSION: PRIORITY OF LIENS. Where a judgment has been enforced, by supplemental proceedings, against the equitable interest of the judgment debtor in real estate, and a deed acquired, the grantee thereunder will be entitled to the possession of said property as against the owner of a senior judgment, under which supplemental proceedings were commenced before those by said grantee, but never prosecuted to a final decree. And while the title under said sheriff's deed will be subject to the lien of the latter judgment, it is absolute as against a judgment senior to that under which said deed was acquired, but under which supplemental proceedings were commenced subsequent to those by said grantee, or, if prior in point of time, were dismissed without a hearing, thus divesting such judgment of the lien thereby acquired.
5. **Practice in Supreme Court:** AMENDED ABSTRACT: TIME FOR FILING: UNNECESSARY RECORD: COSTS. An amended abstract, filed by an appellee, will not be stricken from the files because not filed within the time required by the rules of the supreme court, when no prejudice has resulted. But where such abstract sets out matter fully presented in the abstract of the appellant, and gives some of the evidence in the form of question and answer, the court will make such an apportionment of the costs thereof as may be just in the premises.

*Appeal from Monroe District Court.*—HON. H. C. TRAVERSE, Judge.

MONDAY, OCTOBER 9, 1893.

ACTION in equity to recover possession of certain real estate, to correct errors in its description in a certain action instituted to subject it to the payment of a judgment, and to quiet the title to such real estate in the plaintiff. There was a hearing on the merits, and a decree which denied to the plaintiff a part of the relief demanded. From so much of the decree as is adverse to his interests, he appeals.—*Affirmed in part, and in part reversed.*

*Wm. A. Nichol*, for appellant.

*T. B. Perry*, for appellees.

ROBINSON, C. J.—On the seventeenth day of February, 1883, for the stated consideration of thirty-nine thousand, one hundred and twenty-five dollars, Aaron and William Hicks executed to Archie Douglass a warranty deed, which purported to convey to him about eight hundred and thirty-five acres of land in Monroe county, including that in controversy in this action, which is described as follows: "The east half of the northeast quarter and southwest quarter of the northeast quarter of section thirty-two, and the west half of the northwest quarter of section thirty-three, all in township seventy-three north, of range sixteen west." On the same day Douglass executed to his grantors a mortgage on the land thus conveyed for the alleged purpose of securing the payment of promissory notes to the amount of thirty-eight thousand, five hundred dollars. Four days later the plaintiff commenced two actions, aided by attachments. The record submitted to us is somewhat confused, but we conclude from it, and from admissions of counsel, that one of them was against A. and W. Hicks, and that one was against T. S. Thorp, as principal, and Aaron and William Hicks as sureties. The attach-

ments were levied upon the land in controversy. On the seventeenth day of the next April the plaintiff recovered judgment in the first action against A. and W. Hicks for the sum of one thousand, one hundred and eight dollars and six cents, an attorney's fee, and costs, and an order for the sale of the attached property, and on the next day he recovered judgment in the other action against Thorp, as principal, and Aaron Hicks and William Hicks, as sureties, for one thousand, one hundred and one dollars and sixty-six cents, an attorney's fee, and costs. On the seventh day of November of the same year he caused a special execution, issued for the satisfaction of the first judgment, to be levied on the land, although it does not appear that any sale thereunder was made. On the tenth day of the same month he filed in the proper court two petitions in equity, one describing the first judgment, and the other the second one, and alleging that on the seventeenth day of February, 1883, Aaron and William Hicks, for the purpose of hindering, defrauding, and delaying their creditors, and particularly the plaintiff, executed to Douglass a deed for real estate situate in the county of Monroe, and state of Iowa, which was described. The description given was substantially the same as that contained in the deed to Douglass, excepting that by mistake in the first case the land in section thirty-two was stated to be in township "seventy-two," instead of "seventy-three," and the township in which section thirty-three is situated was omitted. In the second case the land was correctly described. The plaintiff asked in each case that the deed to Douglass and his mortgage be decreed to be fraudulent and void. The relief demanded in each case was granted on the fourth day of March, 1887, the erroneous description contained in the petition in the first case being copied into the decree, and it was adjudged in each case that the real estate therein

described was subject to the judgment of the plaintiff upon which the case was founded. While those actions were pending, in November, 1884, Aaron Hicks died testate, making his widow, Elizabeth A. Hicks, the beneficiary of his estate. Archie Douglass was appointed executor.

On the sixteenth day of April, 1887, an undivided one half of the land in controversy was sold to the plaintiff under a general execution issued by virtue of his first judgment, as the property of William Hicks, for the sum of one thousand, six hundred and fifty-seven dollars and fifty-seven cents. On the sixteenth day of the next month, an undivided one half of the land was sold as the property of William Hicks, under an execution issued for the satisfaction of a judgment in favor of Thomas Trimble, rendered on the twentieth day of February, 1883, and against William and Aaron Hicks. A. Dorothy, who held a judgment against the same defendants, redeemed from the Trimble sale, the plaintiff redeemed from Dorothy, and in June, 1888, the sheriff executed to the plaintiff a deed for William Hicks' interest in the land. On the eleventh day of June, 1887, an undivided one half of the land was sold to the plaintiff for the sum of one thousand, four hundred dollars. It was sold as the property of Aaron Hicks, under an execution issued by virtue of the second judgment in favor of the plaintiff. He claims that redemption from that sale was made by one Tinsley, the owner of a junior judgment lien, and that the plaintiff, as the owner of part of another judgment rendered in favor of one Shaw, redeemed from Tinsley. In June, 1888, the sheriff executed to the plaintiff a deed for Aaron Hicks' share of the land. The plaintiff claims to be the owner of the land, and asks that the mistakes of the petition and decree in the first of the two actions commenced in November, 1883, be corrected, that his title be quieted, and that he have judg-

ment for the possession of the land. Archie Douglass, as executor and in his own right, Elizabeth A. Hicks and William Hicks are made parties defendant.

The defendants deny that the conveyance to Douglass was ever set aside as to the land in controversy, and insist that he is now the owner of it. They contend that for that reason the sale of William Hicks' share, made to satisfy the judgment of April 17, 1883, conveyed no interest. They contend that Douglass redeemed from the plaintiff after he redeemed from Dorothy, and that the sheriff was, for that reason as well as others, without authority to execute a sheriff's deed for William Hicks' share. The defendants claim in regard to the alleged redemption by and from Tinsley, that it was fraudulent and unauthorized and without effect; that Douglass redeemed of the plaintiff Aaron Hicks' share of the southwest quarter of the northeast quarter and the southeast quarter of the northeast quarter of section 32 by a timely payment into court of the amount required for that purpose. They further claim that Douglass is the owner of three judgments, which are liens on the land paramount to that claimed by the plaintiff, one of which was rendered in favor of A. J. Casaday, one in favor of J. R. Wallace, and one in favor of Alexander Ramsey.

The district court decreed that Douglass properly redeemed William Hicks' undivided one half of the south half of the northeast quarter, and the northeast quarter of the northeast quarter of section 32, in township 73, of range 16, from the Trimble sale, and that the plaintiff had no interest therein, but was entitled to the redemption money. The court also decreed that Douglass duly redeemed Aaron Hicks' half of the south half of the northeast quarter of section 32 from the plaintiff's sale of June 11, 1887, excepting from the right acquired by the plaintiff by virtue of a redemption under a part of the Shaw judgment, which the court

decreed that he had a right to make, subject, however, to the Casaday, Wallace and Ramsey judgments, which the plaintiff was required to pay within one year. It was further decreed that the plaintiff has perfect title to, and the right to possess, the west half of the northwest quarter of section 33, and the title to and the right to possess, as a joint tenant, Aaron Hicks' half of the northeast quarter of the northeast quarter of section 32. The appeal requires us to determine the right of the plaintiff as to William Hicks' share of the south half of the northeast quarter, and the northeast quarter of the northeast quarter of section 32, and as to Aaron Hicks' share of the south half of the northeast quarter of the same section.

I. The plaintiff contends that by virtue of his attachment levied in the first suit on the twenty-first day of February, 1883, the judgment rendered

1. ATTACHMENT:  
lien: equitable  
interest in real  
estate: supple-  
mental pro-  
ceedings: er-  
roneous de-  
scription:  
effect.

therein, the equitable action to set aside the conveyance to Douglass, and the decree therein, and the sale of the land, the redemption from the Trimble sale, and the execution of the sheriff's deed, he became vested with the share of the land originally owned by William Hicks. This is denied by the appellees, who insist that, as the land had been conveyed to Douglass before the attachment, and as it was not described in the action in equity brought to set aside that conveyance, he was not required to redeem from the sale to the plaintiff in redeeming from the Trimble sale. It appears that, after the plaintiff redeemed from that sale, Douglass paid to the clerk, for the use of the plaintiff, the amount required to redeem from it, being the full amount of principal paid by the plaintiff to redeem from Dorothy, with interest and costs, but failed to pay anything on account of the judgment in favor of the plaintiff and the sale thereunder. The district court found, as we

have stated, that his redemption was effectual to divest the plaintiff of his interest in William Hicks' share of the land in question on this appeal, and that the money paid by Douglass belonged to the plaintiff.

It is the well settled rule in this state, that the levy of an attachment upon real estate which the attachment debtor has conveyed to another to defraud his creditors, unless followed by supplemental proceedings, creates no lien upon the property so attached. It is true that the interest of a debtor in real property subject to execution, whether legal or equitable, may be seized and sold at the suit of a creditor. But that rule does not apply to a case where the debtor has divested himself of all right to and interest in the property by an absolute conveyance to another. When that is done, he ceases to have any interest in the property which a court would enforce at his suit. Such a conveyance would be good, excepting as against creditors, and the levy of an attachment upon the property conveyed, without more, would not operate to create a lien. *Clark v. Raymond*, 84 Iowa, 251; *Boyle v. Maroney*, 73 Iowa, 70, 71; *Howland v. Knox*, 59 Iowa, 46. See, also, *Lippencott v. Wilson*, 40 Iowa, 425, 428.

In *Bridgman v. McKissick*, 15 Iowa, 260, 261, it appeared that McKissick had purchased certain real estate, the title to which he took in the name of his wife for the purpose of defrauding his creditors. A creditor named Bone commenced an action, aided by attachment, against McKissick, obtained a judgment therein in May, 1861, and in August the land was sold to him at sheriff's sale made by virtue of his judgment. In July, 1861, Bridgman & Company obtained a judgment against McKissick, and commenced an action in the nature of a creditor's bill to subject the land, which had been conveyed to the debtor's wife, to the payment of their judgment. Bone was made a party defendant. This court held that, although his attachment and

judgment were prior to the judgment of the plaintiffs, yet that the latter had the prior right, because they had first commenced proceedings in equity to subject the lands to the payment of their judgment. It was said of Bone's levy and purchase that it conveyed nothing, for the reason that the judgment debtor had no interest in the land which was vendible on execution. He had no interest which he could have enforced against his wife, and the sale under execution would be ineffectual to transfer any title unless followed by an action in equity in which the sale might be confirmed. That holding necessarily rested upon the conclusion that no lien was created by the attachment and judgment in favor of Bone.

It is said that in cases of this kind the fraudulent grantee is a trustee for the creditors, and *Taylor v. Branscombe*, 74 Iowa, 534, 536, is cited as an authority to that effect. It is true that it was therein said that "in the case of a conveyance of real estate to defraud a creditor the grantee is regarded by the law as holding the title in trust for the grantor, to be applied in payment for his debts. As to the creditor, the law regards the debtor as a *cestui que trust*, having an interest in the trust property which may be attached in any civil action." But that language must be construed in harmony with the rules we have stated. It was used in an equitable action, aided by attachment, in which a judgment against the debtor and the setting aside of a fraudulent conveyance were demanded, and applies only to cases when proper equitable proceedings are had to subject the property fraudulently conveyed to the payment of claims against the debtor.

It is said, however, that the property in controversy was subjected to the plaintiff's claim by the decree in the equitable action; that the description of the land contained in the papers in that action was sufficient after rejecting the erroneous part. The peti-

tion in that case described the land, as has been shown, but, in addition, stated that it had been attached in the action of February 21, 1883, and ordered sold by the judgment therein rendered, and asked that the lien of the attachment and judgment be established and enforced "against said real estate." The land was correctly described in the sheriff's return on the writ of attachment and in the incumbrance book, and had the references of the petition been carried into the decree, there would have been more force in the claim of the plaintiff, but the decree described specifically the land to which it referred, and the description would not have been sufficient to identify the land had the erroneous part been rejected. The decree was the final determination of the relief to which the plaintiff was entitled, and, as it did not refer to the land now in controversy, the title to it was not in any manner affected by it, but stood as though the equitable action had never been instituted.

It is said that the erroneous description was inserted in the papers and decree by mistake; that all parties in interest knew what land was intended; that those parties are now in court; and that the mistake may now be corrected. The evidence shows that the error was the result of a mistake, and that the parties knew what land was intended to be reached by the equitable action; but the fact remains that when William Hicks' share of the land in controversy was sold the plaintiff had no lien upon it, and no right to sell it. Douglass was entitled to protect his interest in the land by discharging the liens thereon, and had the right to redeem from the Trimble sale. *Fordyce v. Hicks*, 76 Iowa, 41, 43. He was under no obligation to redeem from the plaintiff, for the reasons stated. Whether he would have made such redemption had it been necessary to protect his title, we can not now determine, and would not be justified in depriving him of the right of electing what course to pursue, which

he would have had in case the judgment of the plaintiff had been a lien upon the land when he was required to determine the course he would pursue to protect his title. It is the policy of the law, when real estate has been erroneously sold to satisfy a judgment which was not a lien upon it at the time of the levy, to permit the sale to be set aside. Code, section 3090. In *Snyder v. Ives*, 42 Iowa, 157, a sale of real estate, made under a decree which was erroneously entered, was set aside, the error was corrected, and a resale ordered. The plaintiff was not entitled to redeem from the Trimble sale, and the fact that Dorothy accepted the money paid for that purpose does not alter the case. Douglass paid all he was required to pay in order to discharge the lien which the plaintiff had acquired from Dorothy. We can not give to the parties the rights they possessed when the sales and redemptions were made, and would not be justified in decreeing to be valid the sale which of itself conferred no right when made. *Ward v. Brewer*, 19 Ill. 291; *Rogers v. Abbott*, 37 Ind. 138; *Keepfer v. Force*, 86 Ind. 87; *Runnels v. Kaylor*, 95 Ind. 504; Freeman on Void Judicial Sales, section 55. We conclude that the redemption made by Douglass of William Hicks' share of the land in controversy was authorized, and effectual to extinguish the Trimble lien.

II. The validity of the sale of Aaron Hicks' share of the land is denied by the appellees on several grounds, which are not so discussed in argument as to require consideration. The appellees insist that the redemption made by the plaintiff under the Shaw judgment was without authority, collusive and fraudulent. The district court adjudged that the redemption so made was authorized, but that it was subject to the Casaday, Wallace and Ramsey judgments; that those judgments were liens on Aaron Hicks' share of the south half of the northeast

2. APPEAL: questions considered by the supreme court.

quarter of section 32, superior to the lien of the Shaw judgment, and that the plaintiff must pay those judgments in full within one year, or he could claim no benefit from his redemption under the Shaw judgment. The defendants do not appeal, and the plaintiff has expressly excepted from his appeal the adjudication of the court that he had redeemed Aaron Hick's share of the land under the Shaw judgment; therefore that part of the decree must stand. *Hanks v. Brown*, 79 Iowa, 564; *Miller v. Schenck*, 78 Iowa, 376; *Charlton v. Sloan*, 76 Iowa, 288; *Smith v. Wolfe*, 55 Iowa, 555, 557; *Hintrager v. Hennessy*, 46 Iowa, 600, 605.

III. It is said that Douglass redeemed from the sale to the plaintiff made June 11, 1887, by paying to the clerk on the eleventh day of June, 1888, the amount for which Aaron Hicks' share in the south half of the north-east quarter of section 32 was sold, with interest and costs. In attempting to so redeem, Douglass acted not as a lienholder, but as the owner of the land. A lienholder is required to redeem within nine months from the date of the sale, unless the time is extended under the provisions of sections 3114-3116 of Code, and that was not done in favor of Douglass. But to redeem as owner he was required to pay the amount which the plaintiff had paid for the certificate which he then held, with interest and costs. Code, section 3106. That amount, including the payment under the Shaw judgment, was much more than the sum actually paid. The attempted redemption was therefore not accomplished.

IV. The remaining question to determine is, what, if anything, is required of the plaintiff to protect the interest he acquired by redeeming under the Shaw judgment? Three judgments were rendered against Aaron and William Hicks by the district court of Monroe county, one of which was in favor of A. J. Casaday, one in favor of J.

2. JUDICIAL sale:  
redemption:  
full payment  
required.

4. —: deed:  
right to pos-  
session: prior-  
ity of liens.

R. Wallace, and one in favor of Alexander Ramsey. All were rendered before the Shaw judgment, which was obtained in April, 1884. The judgment creditor in each case, after recovering judgment, commenced an action in the nature of a creditors' bill, to set aside the conveyance made by Aaron and William Hicks to Douglass in February, 1883, and to subject the land conveyed to the payment of the judgment. The three judgments, including the rights created by the creditors' bills, were transferred to Douglass before this action was commenced, and he now owns the interests thus acquired. The sums due on the three judgments aggregate about five thousand, seven hundred dollars. The theory upon which the district court required the plaintiff to pay those judgments in order to preserve the rights he had acquired under the Shaw judgment appears to be that the judgment in each case and the creditors' bills together created a valid and subsisting lien superior to the rights of the plaintiff. Under the rule announced in another branch of this case the judgments alone created no lien on the land alleged to have been fraudulently conveyed. The creditors' bills gave notice to all persons interested of the rights of the judgment creditors, and were effectual to make subsequent transfers of the property subject to their rights. The filing of each bill created a lien to the extent of the creditors' claim, but such lien was liable to be divested by a dismissal of the bill without a hearing, or by an adjudication that it was not well founded. In *Bridgman v. McKissick*, 15 Iowa, 260, it was said of such a bill that it operates as a *lis pendens*, or, in other words, a general notice of an equity to all the world. 2 Bouvier's Dictionary. Neither of the creditors' bills in the three cases specified has been prosecuted to a final decree. On the contrary, it is shown that the one to enforce the Wallace judgment, after having been carried on the docket for about eight years, has been dropped.

In *Fordyce v. Hicks*, 76 Iowa, 41, it was said in regard to the three judgments under consideration, and the equitable actions to enforce them, that the rights they conferred did not merge in the title Douglass held to the land, but that he was entitled to enforce such rights by means of a counterclaim or cross petition in an action brought to set aside his deed. Douglass now asks that his rights under the same judgments and creditors' bills be adjudged to be superior to the rights of the plaintiff to Aaron Hicks' share of land, acquired through the Shaw judgment, and that he be required to pay those judgments in full before he is permitted to insist upon the right he has so acquired; and the *Fordyce case* is relied upon as authority for the relief asked. The controlling facts in the two cases are not in all respects the same. The decision in the *Fordyce case* was on demurrer to the cross petition, and was, in effect, that Douglass had acquired all the rights of the judgment creditors, and was entitled to have them protected and enforced in that action. It was not held that the lien of Douglass should be paid before the real estate was sold to satisfy the judgment of the plaintiff, although that relief was asked in the cross petition. In this case the deed to Douglass was held, in the equitable action brought to enforce the judgment under which Aaron Hicks' interest was sold, to be fraudulent, and it is shown that Douglass is entitled to all the rights created by the judgments and creditors' bills in the *Casaday, Wallace and Ramsey cases*, but we fail to discover any reason for holding that those judgments, or any of them, must be paid by the plaintiff before he can claim any benefit from the redemption under the Shaw judgment. By that redemption he became entitled to a sheriff's deed for the property of Aaron Hicks now in controversy at the expiration of one year from the date of the sale of June, 1837, and when that deed was issued to him he

became entitled to the possession of the land, and the rents and profits thereof, as against Douglass. The liens held by the latter did not give him the right of possession. In the *Fordyce case* his right to relief was based upon the fact that the liens were not merged in the title conveyed to him by the deed, but that he had the same right to enforce them that his assignors had possessed. If, as in the *Fordyce case*, and the case of *Smith v. Grimes*, 43 Iowa, 356, 357, a sale of the premises was required to give to the plaintiff the relief to which he is entitled, provision might be made for satisfying the senior liens, but no sale is required for that purpose. The plaintiff already has the legal title and the right of possession, and all he desires is to have that right recognized and enforced, and to that he is entitled. The relief granted to him is subject to the right of Douglass to enforce the lien created by the Casaday judgment, and the petition in equity filed to enforce it. The judgment was rendered in April, 1883, and the petition in equity was filed in May of the same year. The lien thus created is paramount to that under which the sale of June, 1887, was made, for the reason that the petition to enforce the judgment under which that sale was made was not filed until November 10, 1883. But the action to enforce the Wallace judgment was not filed until November 19, 1883, and the lien thus created is junior to that under which the sale was made. The redemption under the Shaw judgment was made under sections 3114-3116 of the Code, and, although that judgment is junior to the Ramsey judgment, yet, as the redemption resulted in giving title by virtue of a sheriff's deed issued on a sale made under a judgment senior to that in favor of Ramsey, we are of the opinion that under the facts of this case it should be held that the title thus acquired is not subject to the lien of the Ramsey judgment.

V. A motion has been filed to strike from the record the additional abstract filed by the appellees, and to tax the costs thereof to them, on the ground that it was not served within the time required by section 19 of the rules of this court, and that it was not prepared as required by such rules. It is not our practice to strike an additional abstract from the record for a failure to serve and file it within the time required by the rule, where, as in this case, no prejudice is shown to have resulted from the delay. But the additional abstract sets out matter which was quite fully set out in the abstract of the appellant, and gives some of the evidence in the form of questions and answer. No reason for setting out the evidence in that form appears. We think substantial justice will be done by overruling the motion to strike, and by taxing the costs of printing one half of the additional abstract to the appellees. Of the other costs in the case, including that of one half of the additional abstract, one half will be taxed to each party.

So much of the decree of the district court as adjudged that Douglass had rightly redeemed William Hicks' share of the south half of the northeast quarter, and the northeast quarter of the northeast quarter of section 32, and had a perfect title and right of possession thereto, is affirmed. In other respects, so much of the judgment as is involved in this appeal is REVERSED.

5. PRACTICE in  
supreme court:  
amended ab-  
stract: time  
for filing: un-  
necessary  
record: costs.

JACK E. WRIGHT, Appellee, v. BARNARD BROTHERS,  
Appellees; OSCAR J. NELSON, Inter-  
venor, Appellant.

**Sales:** DELIVERY: TITLE CONDITIONED ON PAYMENT: INNOCENT PURCHASER. The delivery of personal property under an agreement that the party receiving the same shall either return the property or pay the owner a sum named, is a conditional sale, and unless reduced to writing, and duly acknowledged and recorded, as required by section 1922 of the Code, is invalid as against an innocent purchaser without notice.

*Appeal from Lucas District Court.*—HON. W. I. BABB,  
Judge.

TUESDAY, OCTOBER 10, 1893.

ACTION to recover possession of specific personal property. There was a trial by the court without a jury, and a judgment in favor of the plaintiff. The intervenor appeals.—*Reversed.*

*Stuart & Bartholomew*, for appellant.

*Mitchell & Penick*, for appellee.

ROBINSON, C. J.—In October, 1891, the plaintiff was the owner of a black stallion named Keno Second, and the defendants, Bernard Bros., owned a stock farm and stock near Chariton. The defendants asked the plaintiff what would buy the horse, and, when told, said they could not use him at that price. They were asked what they would give, and answered seven hundred dollars. The plaintiff refused to sell for that sum, but finally said he would take eight hundred dollars cash for the horse. The defendants said they thought they could use him at that price, and asked the plaintiff

to take him to their barn for a short time. The plaintiff stated that he would do so only on condition that the horse should remain his property until paid for. The plaintiff knew at the time that the defendants were negotiating for the exchange of their farm and stock near Chariton, and that they desired the horse to use in making the exchange. On the fifteenth day of the month specified, the plaintiff took the horse to the barn of the defendant, and there left him. The agreement between the plaintiff and the defendant was not in writing. Soon after that time the exchange, for which negotiations had been pending with intervenor, was made, and the horse, which was included in the exchange, was transferred to him. He had no notice of the transaction between the plaintiff and defendants, but made the exchange for the horse in good faith in the belief that the defendants owned him. The plaintiff demands possession of the horse, on the ground that the title to him was never transferred to the defendants, while intervenor claims to own him by virtue of the exchange stated. The district court rendered judgment in favor of the plaintiff for the possession of the horse. The defendants did not appear in the district court, and the controversy we are called upon to determine is wholly between the plaintiff and the intervenor. Section 1922 of the Code is as follows:

“Section 1922. No sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages.”

It is claimed by the appellant that the transaction between the plaintiff and the defendants which resulted in the placing of the horse in the barn of

the latter was a conditional sale, within the meaning of that section, and, as it was not in writing, duly acknowledged and recorded, that it is invalid as against him. The appellee contends that the transaction was a mere bailment of the horse, and not a conditional sale. A statement of the distinction between sales and bailments approved in *Foster v. Pettibone*, 7 N. Y. 435, is as follows: "When the identical thing delivered, although in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed; it is a sale." See, also, *Chickering v. Bastress*, 130 Ill. 206, 22 N. E. Rep. 542. The law in regard to conditional sales is stated in 21 Am. and Eng. Encyclopedia of Law, 629 *et seq.*, as follows: "Conditional sales are frequently confounded with bailments, leases, and other agreements. Whatever the form of the agreement, if its purpose is to cover up a sale, and preserve a lien in the seller for the price of the goods, it is a conditional sale, although called in the agreement a bailment or lease." "The courts look to the intent, rather than the name given to the transaction by the parties. If there is an express or implied intent that the title shall not pass until the condition is performed, it is a conditional sale. If the agreement is that the transferee must take the goods and keep them for a certain period, and if in that time he pays for them, he is to become the owner, but otherwise he is to return the goods, and pay for the use of them, the transaction is a bailment, and not a conditional sale. But whenever it appears from the contract between the parties that the owner of the property has transferred the possession thereof to another, reserving to himself the naked title, solely for the purpose of

securing to himself the payment of the price agreed upon between them, the contract is necessarily a conditional sale, and not a bailment." This court held in *Singer S. Machine Co. v. Holcomb*, 40 Iowa, 33, that parol evidence was admissible to show that a contract in writing for the lease of a machine was designed to transfer the title to the lessee upon the performance of the conditions of the lease, and that such a contract was a conditional sale, within the meaning of the statute which we have quoted. See, also, *Farquhar v. McAlevy*, 142 Pa. St. 233, 21 Atl. Rep. 811. In this case the horse was transferred to the defendants on condition that they might acquire the title to him by the payment of eight hundred dollars. The transfer was made with knowledge of the fact that the defendants desired to exchange the horse for other property. It is true, when the horse was delivered to them, they had not said they would purchase him, and the delivery cast upon them no obligation to do so. But they were given the right of possession under an agreement which gave them the option to return the horse or pay the agreed price and keep him. Nothing further was required on the part of the plaintiff. The sole purpose of the condition as to the title was to secure the payment of the purchase price.

The appellee relies upon two decisions of this court as sustaining his claim that the transaction was a mere bailment. The first of these is *Mowbray v. Cady*, 40 Iowa, 604, where a contract, by which one Spencer authorized Charles Legg to take and carry a watch on trial for thirty days, was construed. The contract provided that the watch should remain the property of Spencer until it was returned at the end of thirty days, if not found satisfactory, or a bill of sale should be given on the making of the last payment specified in the agreement. The transaction was held not to be a conditional sale. But it was not completed on the part

of either party to it. When the levy was made, Legg had possession of the watch for the purpose of trying it, and was not to become its owner until he should decide to take it, pay for it, and receive a bill of sale. The other case is *Budlong v. Cottrell*, 64 Iowa, 234, 235. The contract in that case was an order for certain agricultural implements at stated prices, and an agreement to settle for them upon receipt of invoice and bill of lading, until which time the title to and ownership and right of possession of the property was to remain in the firm which was to furnish it. This court held that no credit was given by the agreement, and that no right to, or interest in, the property was transferred, and that there was no conditional sale. In this case the right of possession and the actual possession were transferred to the defendants to enable them to dispose of the horse to the person with whom they were known to be negotiating, and nothing further was required of the plaintiff. His right was to receive the horse, or the agreed price for him, at the election of the defendants. There is no conflict in the evidence in regard to the controlling facts, and we conclude that the transaction was a conditional sale, and, as it was not in writing and recorded, that it was void as to the intervenor. *Morse v. C., R. I. & P. R'y Co.*, 73 Iowa, 226, 227; *Moline Plow Co. v. Braden*, 71 Iowa, 141. The conclusions we have announced make a consideration of other questions discussed unnecessary.

The judgment of the district court is REVERSED.

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**F. MACKINNON & COMPANY, Appellees, v. MUTUAL FIRE INSURANCE COMPANY, Appellant.**

**Fire Insurance: REPRESENTATIONS OF INSURED: EVIDENCE.** A policy of insurance against fire provided that if the building insured "stands on leased ground, or if the title be less than fee simple in the insured, it must be so represented to said company, and so expressed in the

written portion of the policy; otherwise, said policy shall be void." The policy contained no representation whatever as to the title of the insured. *Held*, notwithstanding the provisions of section 2, chapter 211, of Acts of the Eighteenth General Assembly, that, unless a copy of the representations of the insured, which are made a part of the contract of insurance, is attached to such policy, or indorsed thereon, the insurer shall be precluded from pleading or proving such representations, or any part thereof, or the falsity thereof, in an action upon such policy, that evidence that the insured property stood upon leased ground was admissible on behalf of the insurer to show a concealment of the extent of the title of the insured, and to defeat a recovery upon the policy under the above provision.

*Appeal from Clinton District Court.* — HON. P. B. WOLFE, Judge.

TUESDAY, OCTOBER 10, 1893.

ACTION upon a policy of insurance against loss by fire. The plaintiffs allege the issuing of the policy, the loss and proofs of loss, and ask judgment for one thousand, thirty-nine dollars and seventeen cents, with interest. The defendant answers alleging as a defense the following: "It is provided in said policy that if the building stands on leased ground, or if the title be less than fee simple in the insured, it must be so represented to said company, and so expressed in the written portion of the policy; otherwise, said policy shall be void. And the defendant avers the truth to be that the factory building and additions referred to in said policy, at the date of said policy, and until said fire, stood upon leased ground, and the plaintiffs' title was less than a fee simple; and the same was not so represented to said company, or known to it, and was not so expressed in the written portion of said policy. By reason thereof said policy was and is void. It is provided in said policy 'that, if said insured shall conceal any fact material to the risk, said policy shall become void; and the defendant says the plaintiffs did conceal from it facts material to said risk, viz., that said

buildings stood on leased ground, and that the plaintiffs' title was less than fee simple; and by reason thereof said policy became and is void." The case was tried to a jury upon the petition and answer, and at the conclusion of the evidence and arguments the court instructed the jury to find for the plaintiffs in the sum of one thousand, seventy dollars and seventy-five cents, and entered judgment accordingly. The defendant appeals.—*Reversed.*

*A. R. McCoy and E. S. Bailey*, for appellant.

*Henderson, Hurd, Daniels & Kiesel*, for appellees.

GIVEN, J.—One of the plaintiffs testified on cross-examination that the building that was insured was on leased ground, and had been for many years before the fire. On motion of the plaintiffs this evidence was excluded, to which the defendant excepted. The defendant offered in evidence the proofs of loss made by the plaintiffs, for the purpose of showing by the admission therein that the plaintiffs were not the owners in fee simple of the real estate upon which the building stood, and that it was upon leased land. This evidence was excluded, upon the plaintiffs' objection, to which the defendant excepted.

The ground of the plaintiffs' motion and objection is that such evidence is not admissible under section 1733 of McClain's Code (section 2, chapter 211, Acts of Eighteenth General Assembly). Section 1733 is as follows:

"All insurance companies or associations shall upon the issue, or renewal, of any policy attach to such policy, or indorse thereon, a true copy of any application or representation of the assured, which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such

policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging or proving such application or representations or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

One of the purposes of this statute, if not the sole purpose, is to cause all parts of the contract of insurance to appear in or upon the policy. It is certainly not intended that representations appearing on the face of the policy should also appear by copy indorsed thereon or attached thereto. It is only applications and representations of the assured that are made a part of the contract, and which may affect its validity, and that do not appear therein, that are required to be indorsed upon or attached to the policy. To secure observance of this requirement, insurance companies are restricted in their pleadings and proofs to applications and representations thus appearing in or upon the policy. We have seen that this policy expressly provides that if the buildings stand on leased ground, or if the title be less than fee simple in the insured, it must be so represented to said company, and so expressed in this policy; otherwise, the policy will be void. It is not expressed in the policy that the buildings stood on leased ground, nor that the title in the insured was less than fee simple, and the inference must be that it was not so represented to the company. The policy also provides that, if the insured concealed any fact material to the risk, the policy shall be void. It was material to the risk whether the buildings stood upon leased ground, and whether the title of the

insured was less than fee simple. The evidence excluded tends to show that the buildings were on leased ground, that the title of the insured was less than fee simple, and that the insured concealed those facts. It did not tend to prove an application or representation not appearing in or upon the policy, but rather the breach of conditions expressed in the policy. If it may be said that a failure to disclose the true state of their title was a representation on the part of the insured, then it is a representation appearing in the policy, and not within the restrictions of the statute. We think the evidence should have been admitted.

Counsel for the appellee contend that, even if the excluded evidence was admissible, the plaintiffs were entitled to a verdict, because the appellant had alleged, and failed to prove, that it did not know that the building was on leased ground. The right of the defendant to introduce such evidence was involved in the question already considered. If the appellant was not entitled to show that the building was on leased land, then surely it might not show that it did not have knowledge of a fact that it was not allowed to prove. For the error pointed out, the judgment of the district court is REVERSED.

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W. B. STEVENS, Appellee, v. BRADLEY & SON,  
Appellants.

1. **Auctions: WARRANTY: FALSE REPRESENTATIONS: LIABILITY.** The public proclamation to the bidders present at a public sale of hogs, that the hogs "are as thrifty and healthy a lot of hogs as the owner had ever owned in his life, and that he had been in the hog business a good many years," amounts to a warranty of soundness, and is a representation of the fact of their health and soundness as well, which, if false, will constitute ground for an action for fraud and deceit.

2. ———: ———: ———: DAMAGES. In an action to recover on account of the breach of a warranty of the soundness of hogs purchased at public auction, and for false representations as to their health and soundness, made at the time of the sale by the owner, the latter knowing them to be diseased with cholera, the plaintiff is entitled to recover, not only for the loss of the hogs, and for care and attention to them, but also for the loss of other hogs to which the disease was communicated by those purchased.

*Appeal from Appanoose District Court.*—HON. E. L. BURTON, Judge.

TUESDAY, OCTOBER 10, 1893.

ACTION at law to recover damages for breach of warranty, and for fraud and deceit, in the sale of hogs by the defendants to the plaintiff. There was a trial by jury, resulting in a verdict and judgment for the plaintiff. The defendants appeal.—*Affirmed.*

*T. M. Fee*, for appellants.

*Tannehill, Vermillion & Vermillion*, for appellee.

ROTHROCK, J.—On the twentieth day of October, 1889, the defendants sold some three hundred and twenty hogs at public sale. The plaintiff bid off and purchased twenty-seven of said hogs, for which he gave his promissory note for one hundred and fourteen dollars.

He claims that at the time of the sale said hogs were sick and infected with a contagious disease known as "hog cholera," by reason of which disease twenty-five of them died, and the other two became of no value.

This action was brought on the twenty-sixth day of July, 1890, and the petition is in two counts. In the first count it is claimed that the defendants warranted said hogs to be sound and healthy and free from disease, and recovery is demanded because of an alleged breach of said warranty. In another count it is claimed

1. AUCTIONS:  
warranty:  
false repre-  
sentations:  
liability.

that the defendants at the time of the sale represented to the plaintiff and others that said hogs were sound and healthy and free from disease, and that said representations were false and fraudulent, because said hogs were not sound and healthy, but were then infected with hog cholera, and that at the time said representations were made the defendants knew that the same were false, and that the plaintiff relied thereon, and was induced thereby to purchase twenty-seven of said hogs to his damage. In short, the petition is an action for damages for breach of warranty, and for fraud and deceit in the sale of the hogs. The answer was a denial of every allegation of the petition, except the averment that the plaintiff purchased twenty-seven hogs of the defendants. The trial was commenced on the twenty-sixth day of September, 1890, and was continued from day to day until October 3, when the jury returned a verdict for the plaintiff for four hundred dollars.

The public sale appears to have been largely attended, and the lot of hogs was known to many persons before the sale. A large number of witnesses were examined by the respective parties, and experts and nonexperts on the disease known as "hog cholera" were examined at great length. Some thirty-five witnesses were examined by the plaintiff, and as many by the defendants. We have examined all of this evidence with care, because it is claimed with great confidence that the verdict of the jury was clearly contrary to the evidence on the trial of the whole case. From the statement above made as to the great number of witnesses examined on the trial, it is apparent that we can not, in the space properly allowable for the opinion, review the evidence in detail. There are some facts about which there is no real conflict. One of the most important of these is that, within a very short time after the sale, the disease known as "hog cholera" attacked not only the hogs purchased by the plaintiff, but the

separate lots of nearly every other purchaser at the sale. There is no doubt in our minds that the jury were fully warranted in finding that the disease was in the lot of hogs when the sale was made. And here we may say that the court correctly instructed the jury that if the "said hogs had the seeds or germs of said disease in their systems at the time of the sale, and the disease afterwards developed itself, then you [the jury] would be justified in finding that said hogs were diseased animals at the time of the sale." It is manifest that they were not sound if they had the germs of disease awaiting development.

Another fact, not the subject of serious cavil or dispute, is that, immediately prior to the sale, one of the defendants made a public proclamation to the bidders present, that the hogs were as thrifty and healthy a lot of hogs as he had ever owned in his life, and he had been in the hog business a good many years. This was a material representation of a fact, and, if false, and known to be false by the defendants, would authorize a verdict for fraud and deceit; and it was a distinct affirmation of health and soundness, which would authorize a finding that there was a warranty of soundness.

The only doubt we have on any question in the case is whether the defendants knew that the hogs were unsound, or, rather, whether there was sufficient evidence to authorize a verdict for the alleged false representations. The evidence on that subject is very voluminous. It involves not only the condition of the animals at the very time of the sale, but the condition of the whole lot, and the casualties therein by death for a considerable period prior to the sale. Our conclusion is that we can not disturb the verdict on the ground that there was not sufficient evidence of fraud.

II. As we have said, the jury returned a verdict for the plaintiff for four hundred dollars. If the verdict

was based on the breach of warranty, it would be a grave question whether the evidence 2. —: —: —: damages. would sustain a verdict in that amount. The court instructed the jury very fully on the alleged breach of warranty and the fraud. These instructions covered every feature of the case, and are not open to any real objection. The law on these subjects is so well settled that it would be unprofitable to repeat it here. Serious objection is made to that part of the instructions based upon the alleged warranty. It is enough to say of this line of objections that the jury found that the defendants were liable not only for a breach of warranty, but for the alleged fraud.

In addition to the general verdict, the jury answered special interrogatories submitted to them by the court. Three of these interrogatories, with the answers thereto, were as follows: "Do you find the defendants warranted the hogs sold to the plaintiff to be sound and healthy? Answer. Yes." "Do you find that the hogs sold plaintiff were diseased by cholera at the time of the sale? Answer. Yes." "Do you find that the hogs were diseased with cholera at the time defendants sold them to the plaintiff, and that the defendants knew that they were so diseased? Answer. Yes."

It will thus be seen that the jury found that the defendants were liable for the fraud charged in the petition. Having so found, it is entirely immaterial whether the words used by one of the defendants at the time of the sale amounted to a warranty of soundness, or were mere expressions of opinions or commendation. That it was the assertion of a fact which, if false, and known to be false, and induced the sale, and amounted to fraud and deceit, has been the law of this country ever since the time that litigation was so prevalent in pioneer days, when many of the most important cases were based upon fraud and breach of warranty in the exchange and sale of property.

The court instructed the jury that if the sale was made by reason of false representations, the plaintiff was entitled to recover not only for the loss of the hogs purchased, and for care and attention to them, but also for the loss of other hogs to which the disease was communicated by those purchased. We do not understand that this rule as to the measure of damages is questioned, and the jury followed the rule; for, as we read the evidence, the damage must have been estimated on that basis.

There are a multitude of other objections presented by counsel, which we do not regard as well taken. As we read the record and arguments of counsel, the foregoing considerations dispose of every material question in the case. The judgment of the district court is **AFFIRMED**.

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J. B. RITZMANN, Appellant, v. C. ASPELMEIER,  
Appellee.

**Alleys: ADVERSE POSSESSION: LIMITATION OF ACTIONS.** Ten years of uninterrupted use and occupation of an alley under a conveyance, in which said alley was reserved as such to the grantors, but across which the grantee, during said period, maintained a fence, and upon which he paid the taxes and special assessments, is sufficient to constitute a title by adverse possession as against an adjoining lot owner, who has not claimed the right to use said alley for more than ten years.

*Appeal from Des Moines District Court.*—HON. JAMES D. SMYTHE, Judge.

TUESDAY, OCTOBER 10, 1893.

ACTION in equity to enjoin the obstruction of an alleyway. From a decree for the defendant, the plaintiff appeals.—*Affirmed*.

A. H. Stutsman, for appellant.

*Blake & Blake*, for appellee.

KINNE, J.—In April, 1872, Phillip Bauer and William Schaffner owned lot 979, in the city of Burlington, Iowa. Said lot was under the control of Theodore Guelich, trustee, who on said date sold the west forty feet of said lot to one Wright, and the east twenty feet to the plaintiff. Afterwards, the defendant purchased the Wright forty feet. All the deeds conveying the property contained the following provision: "Subject, however, to the right of way for a private alley over the south eight feet of the said described tract." The defendant's forty feet abuts on Jefferson street and Central avenue. The plaintiff's twenty feet of ground is situated east of it, and adjoining the defendant's forty feet. All the tracts faced Jefferson street, and the only means of access to the rear of the building on the plaintiffs lot was over the eight feet thus reserved. The plaintiff claims that the defendant has obstructed this alleyway so as to prevent its use. He asks that the defendant be compelled to remove such obstructions, and that he be perpetually enjoined from again obstructing the same. The defendant admits ownership of the property in controversy, denies the plaintiff's rights to an alleyway over the same, avers that he has been in adverse possession of the claimed right of way for over nineteen years prior to the trial of this action, that same is part of his homestead, and pleads the statute of limitations. He also denies every allegation in the plaintiff's petition not admitted. The court below entered a decree dismissing the plaintiff's bill, from which this appeal is prosecuted.

The grant sought to be enforced is a reservation of a private way by the defendant's grantors, over land granted to him. It is contended by the defendant that the grant was for the benefit of the grantors alone; that by the terms thereof it did not inure to the plaintiff;

hence he had no easement over the property thus conveyed to the defendant. Evidence other than the deeds was introduced, which, if competent and material, shows that the intention was to reserve an alleyway right for the use of all persons who might become purchasers of the real estate. In our view of the case we need not determine whether the reservation in the deeds inured to the benefit of the plaintiff. For the purposes of this case we assume that they did. The question then is, has this right been lost by adverse possession or by operation of the statute of limitations?

Without entering into a detailed discussion of the evidence, we may say that it is conflicting, but we think it fairly establishes the defense of the statute of limitations. The defendant and his grantors have occupied and used this alleged alleyway for more than ten years under a claim of right and adversely to the plaintiff. There is nothing in the evidence to show that the plaintiff ever thought of making any claim to this eight feet of ground now in controversy until a short time prior to the beginning of this action, and after over ten years had elapsed since his right of action had accrued. Indeed, the plaintiff, during all of these years, seems to have acquiesced in the adverse holding and user of the defendant. The defendant improved his part of the lot in 1876. He built a house thereon, and occupied it a part of the time. He made no claim of a right to use the alleyway until in August, 1891. During all of this time, as we understand the evidence, there existed a fence across the alley, and between the property of the plaintiff and defendant, without the removal of which the plaintiff could not have used the alley, even if it had not been otherwise obstructed. It appears from the plaintiff's own testimony that for more than ten years prior to the commencement of this suit the alley had been so obstructed that at most, in some places, the passageway was not over three feet

wide; that the plaintiff never used the alley "to haul things through to the rear of my [his] lot; have had no occasion to go clear through; it wasn't kept open to drive clear through." It appears without conflict that the defendant has paid the taxes and special assessments on this alleyway ever since he purchased the land. That the plaintiff did not claim the eight feet as an alleyway is further shown from the fact that prior to bringing this suit he petitioned the council of the city, to cause the property owners to make an alleyway over this identical ground which he now claims was an alley, and obstructed by the defendant. We need not cite the cases touching what will constitute adverse possession as to set the statute of limitations in operation. We think the facts disclosed by this record show that defendant had been in adverse, actual, visible, exclusive, and continuous occupation of this eight feet of ground under a claim of right for more than ten years prior to the trying of this suit, and hence the plaintiff's action is barred. The court below properly entered a decree for the defendant. **AFFIRMED.**

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**THE STATE OF IOWA, Appellee, v. JOHN A. JONES, JR.,  
Appellant.**

1. **Homicide: SELF-DEFENSE.** The killing of an assailant is excusable, on the ground of self-defense, only when it is, or reasonably appears to be, the only means of saving one's own life, or preventing great bodily injury. If the danger, which appears to be imminent, can be avoided in any other way, as by retiring from the conflict, the taking of the life of the assailant is not excusable.
2. **Evidence: DYING DECLARATIONS.** The declaration of one criminally assaulted, "I am killed; I was helping Charlie," made at a time when the party was aware that he must surely die, is competent evidence of what the deceased was doing when he received the injury, which resulted in his death.
3. **Homicide: ADMISSION OF ACCUSED: WEAPON USED AS EVIDENCE.** The fact that the defendant, in a prosecution for homicide, admits the killing, is not a ground for the exclusion of the weapon, with which the crime was committed, from evidence.

89	182
98	130
100	265

89	182
114	547

89	182
139	479

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*Appeal from Polk District Court.*—HON. C. P. HOLMES,  
Judge.

TUESDAY, OCTOBER 10, 1893.

THE defendant was indicted for the crime of murder in the first degree. He was convicted of murder in the second degree, and he appeals.—*Affirmed.*

*McHenry & Johnson*, for appellant.

*John Y. Stone*, Attorney General, *W. A. Spurrier*, County Attorney, and *Thos. A. Cheshire*, for the State.

ROTHROCK, J.—It is conceded that on the night of the twelfth day of June, 1891, the defendant killed one Frederick Kemp by cutting him on and about the head and neck with a razor. The killing occurred during an altercation between the deceased and the defendant and some other persons, and the sole ground of defense, on the trial in the court below, was that the homicide was committed in self-defense. The parties to the affray, which resulted in the death of Kemp, met at a camp meeting that was then being held in the outskirts of the city of Des Moines. The defendant was armed with a razor, and, after his arrival at the meeting, he procured a revolver. While at the meeting the defendant and two of his companions engaged in a dispute with the deceased, his brother and one or more companions, and the parties left the immediate vicinity of the meeting for the purposes of a fight. The defendant exhibited his revolver, and the brother of the deceased had a revolver. No actual conflict in the way of a general engagement took place between the opposing forces, and there was no violence, except that one of the defendant's friends pushed the deceased over a guy rope attached to a camp meeting tent, and the defendant struck one of the comrades of the

deceased on the head, and afterwards the party who was struck threw a tin can at the defendant. The parties ceased to quarrel for a time, and all repaired to the tent, where the camp meeting was in progress. The defendant and his two friends left the tent and proceeded in the direction of his home. The deceased and his friends, when they left the meeting, went in the same direction, and at some distance from the tent they encountered each other, at or near the corner of Twelfth street and Forest avenue, where the fatal affray took place. There are a great many facts and circumstances disclosed in evidence touching the acts of the parties from the first quarrel at the tent down to the fatal encounter, and it is argued at great length, in behalf of the appellant, that the verdict returned by the jury is without support in the evidence.

I. It would be an almost endless task to review the evidence in an opinion, and we will not attempt to do so. It may be conceded, and we believe that the preponderance of the evidence, so far as the number of witnesses who testified to the last encounter is concerned, shows that the deceased and his friends made the first assault, and attacked the defendant, and one of them struck him with a piece of board. But there is a square conflict in the evidence on this question. If the evidence introduced by the state is to be believed, the defendant and his friends were the aggressors, not only in the affray at the tent, but in the final struggle, in which the defendant took the life of Kemp. A careful examination of every fact and circumstance disclosed in evidence satisfies us that this is not a case in which this court is authorized to interfere with the verdict as being contrary to the evidence. The evidence is quite fully set out in the abstract of the appellant. There is an additional abstract prepared by counsel for the state, the correctness of which is denied by counsel for the appellant. An examination

of these abstracts, in connection with the original record, has put us in possession of every feature of the evidence, and we do not hesitate to hold that we ought not to interfere with this verdict. It may not be amiss to say that none of the parties to the tragedy went to the camp meeting as worshippers. On the contrary, they went there armed with deadly weapons. The jury was fully warranted in finding from the evidence that the defendant was in possession of the razor with which he killed Kemp on the day of the killing, and that he sharpened it on a whetstone in a butchershop, where he made the declaration that "he was going to hold somebody up before camp meeting was over." Taking this evidence in connection with the fact that the defendant thought it necessary, after he arrived at the meeting, to add a revolver to his other weapon, it is not too much to say that he was at a great disadvantage in his endeavor to maintain that the homicide was excusable by reason of self-defense.

II. It is claimed that the court erred in the ninth paragraph of the charge to the jury. It is as follows:

"As before stated, the defendant admits the killing of Fred Kemp, and his claim is that, in what he then did, he was acting in self-defense.

1. **HOMICIDE:**  
**self-defense.** You are instructed, in relation to this claim of the defendant, that where one is assaulted by another person or persons, in such manner as to induce in the person assaulted a reasonable belief that he is at the time in actual danger of losing his life or of suffering great bodily harm, he is justified in defending himself, although the danger be not real, but only apparent; and he may use such force and means to defend himself as may in good faith reasonably appear necessary to him, as an ordinarily prudent man, under all the circumstances at the time surrounding him. All that is required of him is that he shall act from reasonable and honest convictions as to his danger, although

mistaken as to the extent of such danger. And if you shall find from the evidence in this case that, just before the defendant killed Fred Kemp, he had been assaulted by the said Fred Kemp, either alone or in connection with others, and that from the character of such assault, and the weapon used, if any, he had reason, as an ordinarily prudent man, to believe, and did in good faith and honestly believe, that he was in danger of being killed or of suffering great bodily injury, and that the parties were so situated that he could not have retreated, or that he could not reasonably have expected to preserve his life, or protect himself from injury, by retreating, then, and in that case, he was justified in using such force and such means to protect his life and person as may in good faith then have appeared necessary to him as an ordinarily prudent man, under all the circumstances then surrounding him, even to the taking of life. And if you shall find that he did not use greater force or more hazardous means to protect his life and person than really appeared to him necessary as an ordinarily prudent man, under the circumstances in which he was then placed, then, and in that case, such killing was not unlawful, and you should return a verdict of not guilty; but if you shall find that he did use greater force or more hazardous means than appeared to him necessary, as an ordinarily prudent man, in the position in which he was then placed, you can not acquit him on the ground of self-defense."

The specific objection to this instruction goes to that part of it which, under the facts recited, required the defendant to retreat or retire from the conflict unless it appeared to him, as a reasonably prudent man, that he could not retreat without danger to his life or danger of great bodily injury. It may be conceded that in the earlier adjudications of this court there is language employed which may be said to lay down the doctrine that one who is assailed with a deadly

weapon is not required to flee from his adversary, but may strike and kill in his own defense. See *Tweedy v. State*, 5 Iowa, 433. But in the later utterances of this court, and it may now be said to be the general rule elsewhere that, the killing of an assailant is excusable on the ground of self-defense only when it is, or reasonably appears to be, the only means of saving one's own life or preventing some great bodily injury. If the danger which appears to be imminent can be avoided in any other way, as by retiring from the conflict, the taking of the life of the assailant is not excusable. *State v. Maloy*, 44 Iowa, 104; *State v. Donnelly*, 69 Iowa, 705; *State v. Sullivan*, 51 Iowa, 142; *State v. Mahan*, 68 Iowa, 304; *State v. Shelton*, 64 Iowa, 333; *State v. Shreves*, 81 Iowa, 615.

Another objection is made to this part of the charge, which we do not regard as of sufficient importance to give it special consideration. It appears to us to be a mere criticism, and without substantial merit.

III. A great many other objections are made to rulings of the court which do not appear to us to require separate discussion. They relate to alleged misconduct of the jury pending the trial, and to the prejudice of certain jurors before they entered upon their duties. There were affidavits accompanying the motion for a new trial, and counter affidavits were filed, and witnesses were examined, as to the conduct of the jury, to such an extent as is rarely found in any record in this court. It is sufficient to say, of all these objections, that the court did not err in overruling the motion for a new trial on the grounds mentioned.

IV. Other objections consist of exceptions taken to the admission of an alleged dying declaration of the deceased. There was no error in this.

2. EVIDENCE: dying declarations.

The declaration seems to have been made by the deceased when he was aware that he must surely die, and the fact is that he did die soon thereafter. The

declaration was in these words: "I am killed. I was helping Charlie." There can be no doubt this was competent evidence of a fact as to what the deceased was doing when he received the fatal cuts with the razor in the hands of the defendant. This appears from the other facts attending the homicide.

V. Objection was made to the introduction in evidence of the razor which the defendant used in taking the life of the deceased. Another objection was made to the introduction of certain evidence by the state in rebuttal, on the ground that the evidence was not rebutting. There is no real ground for these objections. The mere statement of the objection to the introduction of the razor in evidence is sufficient to show how little ground there is for it. Because the defendant admitted that he killed Kemp was no reason why the weapon which he used should not be introduced in evidence. There are other objections to this judgment which we do not think it necessary to refer to, more than to say that they are without merit. A careful examination of the whole record leads us to the conclusion that the case should be affirmed, and it is so ordered. **AFFIRMED.**

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**THE STATE OF IOWA, Appellee, v. A. L. BAKER,  
Appellant.**

1. **Bastardy: PROOF OF PATERNITY: CONFLICT OF EVIDENCE.** Where in an action for the support of a bastard child the fact of sexual intercourse was admitted by the defendant, and the evidence was conflicting upon the question whether the parties were together during the period when conception must have taken place, but the preponderance was in favor of the state, *held*, that a verdict against the defendant would not be disturbed, although it appeared that during the same period the complainant had intercourse with other men.
2. **—: SETTLEMENT: AGREEMENT BY MINOR.** A settlement, made by a minor female, in full of all claims on account of sexual intercourse had with her, can not be set up as a bar to an action by the state to recover support for a bastard child of its putative father.

3. **Practice in Supreme Court: QUESTIONS CONSIDERED ON APPEAL.** The supreme court will not consider questions which are raised for the first time upon appeal.
4. **Witnesses: CREDIBILITY: INSTRUCTIONS TO JURY.** The district court being asked to instruct the jury that, if they found that any witness in the case had knowingly sworn falsely in relation to any material matter or statement, then they might disregard the entire evidence of such witness, gave such instruction with the addition, "But you are not bound to do so if you still believe it worthy of credit." *Heid*, that the additional words did not change the legal effect of the instruction asked.

*Appeal from Lucas District Court.*—HON. W. I. BABB,  
Judge.

TUESDAY, OCTOBER 10, 1893.

PROCEEDING under the bastardy act for the support of a child. There was a verdict and judgment against the defendant, from which he appeals.—*Affirmed*.

*Will B. Barger and Stuart & Bartholomew*, for appellant.

*Mitchell & Penick, J. C. Copeland and John Y. Stone*, Attorney General, for the State.

GRANGER, J.—The information was filed by one Julia A. Flood, who on the thirteenth day of July, 1891, gave birth to an illegitimate child.

1 **BASTARDY:** It is sought to establish by the proceeding  
proof of pa-  
ternity. con-  
flict of evi-  
dence. that the defendant is the father of the  
child, and require him to support it, and  
the verdict and judgment below impose upon him that  
duty.

It is said that the evidence does not show him to be the father of the child. There is certainly a substantial conflict in the evidence on this question. It is undisputed that the complainant gave birth to the child, and that before its birth the defendant had sexual intercourse with her, the parties to the intercourse dis-

puting in their testimony as to the time of its occurrence. She testifies that she first had intercourse with him in August, 1890, and the last time on the seventeenth day of March, 1891. He testified that their first intercourse was in the middle or last of February, and "the last time was the seventeenth of March." She says the defendant was with her two or three nights a week from August until the seventeenth of March. She says he was not with her in the months of September and October; that he might have been in November, and was about Christmas. The mother of the complainant says that she saw the defendant with her daughter in September and October, both times after night. She also heard him at the gate with her in August, supposed it to be him from his voice. Maggie Davis testified: "I saw Albert Baker in company with Julia Flood once in the month of October, at Cleveland, and I saw Albert Baker with Julia Flood once before. They were coming from Lucas." Upon the particular fact of the parties being together before the time stated by the defendant the testimony may be said to predominate in favor of the state. Certainly, it can not be said that there is such a want of testimony in that particular as to warrant an interference by the court. With the fact conceded that there was the intercourse, and the fact established by evidence, as the jury must have found, that the parties were together during the period when conception must have taken place in the natural order of events, it leaves but little room to dispute the sufficiency of the finding by the jury, that the parties had intercourse during that period. If the finding of the jury in this respect is to be sustained, its finding in respect to the parentage of the child must also be sustained, unless there are other facts or evidence that authorize us to set it aside. There is testimony tending strongly to show that the complainant was in the company of other men during the months

of September, October, and November, 1891, under circumstances to justify grave suspicions as to her character for chastity, and in some particulars to warrant a conclusion against her. This is certainly all the appellant can claim for the testimony. It should, however, be said that in all respects her testimony presents a plain conflict as to the fact, and in some of the particulars the conflict is aided by other testimony. But, for the purposes of the case, let it be conceded that there was intercourse by others. That fact would not excuse the defendant, if the father of the child, and the question for the jury would be, which of those having intercourse was the guilty one? It is not the fact of intercourse in such a case that constitutes the guilt. It is the paternity. The facts as to intercourse with others are important in fixing the fact of paternity, but, even though they make difficult the solution of the question, they do not have the effect claimed for them by the appellant in this case. See *State v. Pratt*, 40 Iowa, 631; *State v. Borie*, 79 Iowa, 605.

II. On the twenty-ninth of April, 1891, the complainant and the defendant and his father entered into a written stipulation of settlement, by the terms of which she received one hundred dollars in full of all claims against the defendant "on account of such sexual intercourse, if such intercourse had ever occurred." She further agreed "not to claim that the said Albert Baker is the father of the child that she is now pregnant with." The agreement contains many other provisions not necessary to specify. The state, in a reply, pleaded that the agreement was obtained by fraud, and that at the time of its execution the complainant was but seventeen years of age. The court instructed the jury that, if the complainant was but a minor when the agreement was made, it did not bind the state, even though fairly entered into.

2. —: settlement: agreement by minor.

Complaint is made of the instruction. We think it correctly states the law. If the public, in such a case, is bound by the contract of an adult female who is the mother of such a child, it is because she is capable of assuming obligations herself, and presumably capable of protecting the public from the liability sought to be avoided by the proceeding against the putative father. A minor has not the capacity to assume such obligations, nor does the law presume one capable of discharging them if assumed. It can not be fairly said that such a minor has power to bind the public against asserting a legal right when she has not the power to bind herself to the same extent. The law fixes the obligations of a putative father to the public, and there are no considerations to support a rule whereby one incapable of contracting should be permitted to waive those obligations, either with or without consideration. Code, section 2238, as to disaffirmance, has no application in such a case. There is some conflict of testimony as to the fact of the minority of the complainant when the agreement was made, but the state of the record is such that it was solely a question for the jury.

III. It is said that at the time of making the agreement of settlement the complainant represented that she was twenty four years of age, and the rule of law is invoked with regard to misrepresentations by minors as to their age. It is sufficient to say that the question is first presented in this court. No such claim appears to have been made on the trial below, and it is now too late. The application of the law would involve a finding of fact as to there being good reason to believe the minor capable of contracting. Code, section 2239. We are not to be understood as holding that the statute would apply in such a case.

2. PRACTICE IN SUPREME COURT: questions considered on appeal.

IV. The defendant asked the court to instruct that, "if you find that any witness in this case has knowingly

4. **WITNESSES:** sworn falsely in relation to any material  
**credibility:** matter or statement, then you may disre-  
**instructions to** gard the entire evidence of such witness."  
**jury.**

The court added the following: "But you are not bound to do so if you still believe it worthy of credit." Complaint is made because of the added words. They did not change the legal effect of the instruction as asked. As asked, the instruction left to the jury a discretion as to disregarding "such matter or statement," and the added words did no more than emphasize that feature of the instruction. There is no error in the action of the court.

V. The complainant, at the time of the birth of her child, was in Chicago. It is insisted that she was not at that time a resident of Lucas county, and hence that the judgment can not be sustained. Under the instructions of the court the jury must have found her residence in Lucas county, and the testimony is such that the finding should not be disturbed by us.

We have carefully considered other complaints as to giving and refusing instructions, and find no error. **AFFIRMED.**

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**CHARLES WALL, Appellee, v. DES MOINES & NORTH-  
 WESTERN RAILWAY COMPANY, Appellant.**

1. **Railroads: INJURY TO STOCK: EVIDENCE.** In an action to recover for the negligent killing of a colt by a railroad company, the admission in evidence of statement made by the defendant's section boss and station agent in regard to the colt, which were not part of the *res gesta*, nor shown to be authorized by the employment of the persons who made them, is erroneous.
2. ———: ———: **INSTRUCTIONS TO JURY.** The facts alleged in the petition as constituting negligence being admitted by the defendant in its answer, and the only issue being whether the colt in question was in fact killed by the defendant, *held*, that an instruction to the jury submitting the question whether the defendant was negligent in the operation of its trains was erroneous.

89	193
91	608
89	193
92	497
89	193
108	601
89	193
121	475
89	193
137	364
89	193
140	195

3. ———: ———: ———. The language of section 1289 of the Code, that to entitle the plaintiff in such action to recover, "it is only necessary for him to prove the injury to, or destruction of, his property," is not intended to dispense with all proof on the part of the plaintiff, except as to the fact of injury or destruction, and an instruction to the jury in the language of that part of the statute, without modification or explanation, is erroneous, and is to be deemed prejudicial, although the facts which the plaintiff is required to prove in order to recover are stated at length in another part of the charge.

*Appeal from Guthrie District Court.*— HON. A. W. WILKINSON, Judge.

WEDNESDAY, OCTOBER 11, 1893.

ACTION to recover double the value of a colt alleged to have been killed by the defendant in operating its railway at a point where it had a right to fence, but failed to do so. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Reversed.*

*Cummins & Wright*, for appellant.

*S. D. Nichols*, for appellee.

ROBINSON, C. J.—The pleadings and evidence show that on the morning of Sunday, the ninth day of November, 1890, a colt owned by the plaintiff was found dead a few feet from the railway track of the defendant, at a point north of Panora, where the right to fence its right of way existed, but where there was no fence. Nothing in the external appearance of the colt indicated the cause of its death. Its skin was removed, and a severe bruise on the right shoulder, and a less important one over the right hip, were disclosed. The bruise on the shoulder extended below the surface, and a dissection showed that the immediate cause of death was the rupture of an artery under the sternum. When last seen alive, late in the afternoon of November 8, the colt, with three others, was a short distance west of the railway, moving

slowly towards it. After it was discovered, the tracks of three colts or horses were seen, which showed that the animals, in making them, moved in a southeasterly direction, crossing the railway near the place where the dead colt was found, and that there were tracks of another colt made in the same direction, which could not be traced beyond the railway track, but ended there, at a point twenty or twenty-five feet from the place where the dead colt was lying. A notice of the death of the colt and of the claim made on account of it, accompanied by an affidavit, was served on the defendant. Payment not having been made within thirty days from the time of the service of the notice, this action was commenced to recover double the value of the colt.

It is the theory of the plaintiff that the colt, while attempting to cross the track, was struck by the engine of the train of the defendant which passed northward at the place of the accident a few minutes before 6 o'clock in the afternoon of November 8, and thrown from the track a distance of twenty or twenty-five feet, thereby receiving the injuries which caused its death. The defendant denies that the theories are sustained by the evidence, and insists that the death of the colt might have been caused by a kick from one of the other colts as well as by a blow from the engine.

I. On the trial of the cause the plaintiff was permitted to prove, against the objections of the defendant, certain statements of a section boss in regard to the death of the colt, the disposition to be made of it, and in regard to an arbitration, and also a direction of the agent of the defendant at Panora in regard to the colt. The statements thus proven were not a part of the *res gestæ*, and were not, so far as is shown, authorized by the employment of the persons who made them. The appellee does not defend the rulings with much apparent confidence in their correctness, but insists that, if

1. RAILROADS:  
injury to  
stock: evi-  
dence.

erroneous, the testimony thus admitted was without prejudice. We think that is clearly true of some of it, but with regard to some there is more doubt. Since we find it necessary to reverse the judgment of the district court on another ground, it is only necessary to say that proof of the statements in question was erroneously admitted.

II. The fifth paragraph of the charge to the jury was as follows:

“The defendant, being a corporation, acts through its officers, agents and employees, and the negligence of the employees of defendant would, in law, be the negligence of the defendant corporation. It was the duty of the defendant, its agents and employees, to exercise ordinary care and diligence in the operation of its trains; and by ordinary care and diligence is meant that care and caution that a reasonably prudent, careful and cautious person would have exercised under the same circumstances.”

The defendant complains of this on the ground that no issue in regard to negligence was tendered by the pleadings, the failure to build the fence alleged in the petition having been admitted in the answer. The plaintiff concedes that this is true, but insists that no prejudice resulted from the giving of that portion of the charge. We are of the opinion, however, that the record does not show that no prejudice resulted from it. Its natural effect would be to confuse the jury in regard to the real issues they were required to determine, and to induce them to seek for evidence of negligence on the part of the employees of the defendant. It appears that the glass of the headlight of the engine which it is claimed struck the colt was broken, and at Panora a lantern was placed in the reflector, and used in lieu of the ordinary light. What effect that had in the minds of the jury, in connection with

2. —: —:  
instructions  
to jury.

the portion of the charge under consideration, can not be told. We conclude that the giving of that portion of the charge must be treated as prejudicial error.

III. The appellant complains a portion of the sixth paragraph of the charge which reads as follows:

a. —: —: —. “And to entitle such owner to recover, it is only necessary for him to prove the injury to, or destruction of, his property.” It will be noticed that this is a paraphrase of a part of section 1289 of the Code. We had occasion to consider that provision in the case of *Manwell v. Burlington C. R. & N. R’y Co.*, 80 Iowa, 663, where we held that the various provisions of the statute must be construed together, and that it was not designed to dispense with all proof on the part of the owner in cases of this kind, excepting as to the injury or destruction of his property. The statement of the law, as given in the part of the charge quoted, without modification or explanation is erroneous. In another portion of the charge, the facts which the plaintiff was required to prove in order to recover were stated at length, and it may be that no prejudice resulted from the statement quoted, but we are of the opinion that it would be better practice to avoid the appearance of a conflict in the different portions of the charge which might confuse and mislead the jury.

For the errors pointed out, the judgment of the district court is REVERSED.

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A. A. LAGOMARCINO & COMPANY, Appellees, v. N.  
QUATTROCHI, Appellee; S. FERROCANO,  
Intervenor, Appellant.

**Attachment:** INTERVENTION: PLEADING: BURDEN OF PROOF. A petition of intervention in an action by attachment, wherein certain personal property had been seized, alleged that, at the date of the levy, and at the time of filing of said petition, the intervenor was the owner of the property, that he acquired such ownership by purchase from time to time of the attachment defendant, and that the same

was in his possession at the time of the levy of the attachment. The attachment plaintiff, for answer to said petition of intervention, denied that the intervenor was on the day when he filed his petition the owner of the property, or entitled to its possession. *Held*, that the burden was upon the intervenor to prove that he was the owner of the property at the date of filing his petition.

*Appeal from Muscatine District Court.*—HON. C. M. WATERMAN, Judge.

WEDNESDAY, MAY 11, 1893.

THE plaintiff brought its action on account for goods sold and delivered, and aided it by an attachment by virtue of which a stock of goods was seized in a certain building. The defendant made default, and judgment was entered against him for four hundred and sixty-seven dollars and costs, and the attachment was sustained on the twenty-first of April, 1892. On the twenty-fourth of November, 1891, the intervenor filed his petition, claiming to own the property attached by purchase from the defendant. On the twenty-sixth of April, 1892, intervenor amended his petition by averring that prior to and at the time of the levy of the attachment the goods were in his possession, and were taken therefrom by virtue of the attachment. The following is the first division of the answer filed by the plaintiff to the intervention petition filed April 25, 1892: "*First*. Deny that the said intervenor was on the day when he filed his petition of intervention the owner of the property in his petition described, or entitled to its possession. The plaintiffs further say that on December 2, 1891, the intervenor filed a delivery bond with the sheriff, which was accepted, and the goods claimed by intervenor were then delivered to him, and he still retains them." There are three other divisions of the answer, each of which contains only matters of affirmative defense. To the amendment to the petition no answer was filed. A

jury was impaneled on the issue thus presented, and the court held that the burden of proof was with the intervenor, and directed him to proceed. To this ruling the intervenor excepted, and declined to introduce evidence; whereupon a verdict was ordered for the plaintiff, and judgment was entered thereon, from which the intervenor appeals.—*Affirmed*.

*Horan & Devitt and Detwiler & Doran*, for appellant.

*Newman & Blake and Jayne & Hoffman*, for appellee.

GRANGER, J.—The only question for determination is that of the burden of proof. It is held by the appellant that the answer “does not contain a denial of anything alleged by the intervenor.” The property was taken on the attachment from “A. A. Conklig’s frame building” as the property of the defendant. The intervenor’s petition recites “that he is the owner of the personal property in A. A. Conklig’s frame building; \* \* \* that this intervenor was at the date of the said levy, and now is, the owner of said property; \* \* \* that this intervenor acquired the said goods by purchase from said defendant from time to time,” etc. Under these averments, the intervenor can recover only by proof that he owned the property at the date of the filing of his petition. If he did not then own the property, he could not recover. This ownership could be established by the admissions of the plaintiff or by proofs of the defendant. The fact of ownership would be admitted, if not denied. The answer of the plaintiff says in terms: I “deny that the said intervenor was on the day when he filed his petition of intervention the owner of the property, \* \* \* or entitled to its possession.” It seems to us that this is a plain denial of ownership.

Importance is attached to the fact that intervenor’s possession at the time of the levy is not denied, and

the rule of law is urged that possession of personal property is presumptive evidence of ownership. See 1 Greenleaf on Evidence, section 34; *Wallace v. Wallace*, 62 Iowa, 651. The rule does not apply to this case. This property belonged to the defendant, under the claims of both parties, at one time; and the real issue was, as presented, had the intervenor purchased it? He averred that his ownership was by purchase. Mere possession would not prove purchase. Under the intervenor's statements, if he had not purchased the property, he did not own it. We think he assumed by his pleading the burden of showing a purchase. The district court did not err, and its judgment is **AFFIRMED**.

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**SAMANTHA KECK, Appellant, v. HOTEL OWNERS MUTUAL  
FIRE INSURANCE COMPANY, et al., Appellees.**

**Compromise: CONSIDERATION: ACCEPTANCE: EFFECT.** A mutual fire insurance company, having its office in Iowa, sent to a bank in Nebraska a draft for about sixty-seven *per cent.* of a loss payable there, with instructions to deliver the same to the plaintiff upon her signing a receipt that such amount "was in full payment and compromise settlement of all claims and demands" for the loss in question, and that in consideration of such payment the said insurance company was thereby "discharged forever from all further claim by reason of said fire, loss and damage." The insurance company did not claim that the amount of such draft was the full amount of the loss due under said policy, but that as a mutual insurance company it was only bound to pay the share of such loss in the amount collected upon assessments of premium notes, and that said draft represented such sum. The plaintiff on the other hand insisted that the contract of insurance required the company to pay the loss under said policy in full. The plaintiff having indorsed the draft, and left it with the bank for collection, for the purpose of bringing the amount thereof within the jurisdiction of the courts of Nebraska, and subject to an attachment, which she caused to be issued in an action against the defendant on said policy, *held*, that the plaintiff's indorsement of said draft was in effect an acceptance thereof upon the condition under which it was tendered, although the receipt was not signed, and that the liability of the insurance company under said policy was thereby discharged.

89	200
115	558

89	200
118	540
118	541

89	200
119	152

*Appeal from the Union District Court.*—HON. W. H. TEDFORD, Judge.

WEDNESDAY, OCTOBER 11, 1893.

ACTION on a policy of fire insurance to recover an amount alleged to be due on account of the destruction of the property insured by fire. There was a trial by the court without the intervention of a jury, and a judgment in favor of the defendant, the Anchor Fire Insurance Company for costs. The plaintiff appeals.—*Affirmed.*

*T. M. Stuart*, for appellant.

*Sullivan & Sullivan*, for appellees.

ROBINSON, C. J.—In December, 1889, the Hotel Owners' Mutual Fire Insurance Company of Creston issued to the plaintiff the policy in suit. It purported to insure her against loss or damages by fire and lightning to the amount of two thousand, five hundred dollars on certain hotel property in the town of Kearney, in the state of Nebraska. Other insurance was permitted and carried. In January, 1890, the name of the company was changed to Anchor Mutual Fire Insurance Company, and it is made the defendant under both the old and the new names. On the twenty-fourth day of March, 1890, while the policy was in force, the property insured was destroyed by fire. Notice of the loss was at once given to the defendant, and proof of loss was duly made, showing that the value of the insured property destroyed was twenty-seven thousand two hundred and fifty dollars, and that the defendant's share of the loss was two thousand four hundred and seventy-seven dollars and twenty-seven cents. On the seventh day of April, 1890, the defendant acknowledged receipt of the proof of loss, and stated that it was not

disposed to dispute its liability under the policy. It also said. "We regret, being a new company, and an assessment company, that we are unable to accept your offer of a discount for the immediate payment in advance of the sixty days' allowance of time. We will endeavor to pay your policy at the expiration of sixty days." On the fourteenth day of June the plaintiff called the attention of the defendant to the fact that the loss had not been paid. Two days later the defendant wrote to plaintiff as follows: "Madam: Your favor of the fourteenth inst. received. Would say, in reply thereto, we are prepared to pay you the amount due you from this company by loss under its policy number 180. Being a mutual company, we regret that at the time of your loss our association had not progressed sufficiently far in its organization, or issued such a number of policies, that receipts from premium collections thereon would enable it to pay your loss in full. We are now ready to remit to you, as per our plan of organization, the amount due you by loss under policy number 180." In answer, on the eighteenth day of June, the plaintiff wrote as follows: "Dear Sir: Yours of the sixteenth to hand, in which you say, 'Would say, in reply thereto, we are prepared to pay you the amount due you from this company by loss under its policy number 180,' and, further, that you are ready to remit. In answer thereto I beg to say that we are still patiently awaiting such payment and remittance, and hope you will do so at once." On the twentieth day of June the defendant sent to the Kearney Savings Bank at Kearney a draft for one thousand six hundred and seventy-one dollars and fifty cents, with a letter in terms as follows: "Gentlemen: Inclosed we hand you draft number 62,565 on First National Bank, Chicago, one thousand six hundred and seventy-one dollars and fifty cents, payable to Samantha Keck. We also hand you receipt to be signed

by Samantha Keck before draft is turned over to her. Please return receipt duly signed by Samantha Keck to us, and oblige." The receipt referred to in the letter was as follows:

"Total Loss. Creston, Iowa, June 20, 1890. Received of the Anchor Mutual Fire Insurance Company, formerly the Hotel Owners' Insurance Company, through George J. Delmege, adjuster of said company, the sum of sixteen hundred and seventy-one and fifty hundredths dollars (\$1,671.50), being in full payment and compromise settlement of all claims and demands for loss or damage by fire which occurred on the twenty-fourth day of March, 1890, to the property insured under policy number 180, issued at the home office agency of said company; and in consideration of said payment the said company is hereby discharged forever from all further claim by reason of said fire, loss and damage, and the policy is hereby surrendered and canceled. Net amount paid, sixteen hundred and seventy-one dollars and fifty cents."

On the same day the defendant sent to the plaintiff a letter, as follows: "Madam: We have this day forwarded to Kearney Savings Bank our draft for payment of loss under our policy, number 180, held by you. As you know our company is not fully organized, and under the terms of our articles of incorporation you are entitled to the amount of an assessment on premium notes held by the company at the time of the loss. Please call at the bank, sign receipt, and take up the draft." On the next day plaintiff answered that letter, objecting to taking less from the defendant than its full share of the loss, denying that there had been any compromise as indicated in the receipt, insisting, in effect, upon payment in full, and asking for the reason of the defendant for tendering less than that amount. The closing paragraph of the letter is as follows: "We have not signed the receipt, nor

accepted the draft sent, for the reasons above; nor shall we, until full explanation by you as above requested, and to our satisfaction." In answer to that letter, the defendant on the twenty-third day of June, wrote as follows:

"Your favor of the twenty-first inst., in reference to the amount of check sent you in payment of loss under our policy, number 180, is received. As you understand, this company is a mutual company, and as yet is only in process of organization. The amount it can pay, in event of loss, depends upon the amount of premiums it can collect from its policy holders. We had some heavy losses at other points about the time the Midway Hotel was burned, and we assure you we have made every effort to collect premiums on policies issued to meet these losses. In Nebraska we have been unfortunate in our collections, and, of course, if the parties do not pay their premiums when due, we have no means of forcing them to do so. We beg leave to assure you that in arranging for the payment of loss, under policy number 180, we have exerted ourselves to raise as large a sum as possible, and regret that, being a young mutual company, we are unable to raise the full amount of your loss. We wish to say to you that there is nothing ambiguous in any letter we have written you. We have simply stated to you our facts. Our company is a mutual company, and, as yet, unorganized. In your case we have exhausted every means, and have secured for you a liberal sum under the circumstances, and we feel that you should appreciate the same. If you wish to sign the receipt and take up the draft, you now have an opportunity to do so."

The draft sent to the Kearney Savings Bank was on the First National Bank of Chicago, and was payable to George J. Delmege, secretary, and was indorsed by him in words as follows: "Pay Samantha Keck.

George H. Delmege, secretary." On a date not shown, plaintiff indorsed the draft as follows: "Pay Kearney Savings Bank for deposits. Samantha Keck." The draft was then forwarded to Chicago, accepted by the drawee on the twenty-third day of June, and paid on the twenty-eighth. On the date last named the plaintiff commenced in the district court of Buffalo county, Nebraska, an action against the defendant for its share of the loss. An attachment was issued, under which the Kearney Savings Bank was garnished as a debtor. The action was prosecuted to judgment, and the bank was ordered to pay the proceeds of the draft into the court to apply on the judgment. This action is brought to recover twelve hundred dollars, alleged to be the remainder due under the policy.

The defendant contends that the amount for which the draft was sent was the full amount it was required to pay by the contract of insurance, and that, if this was not true, the act of the plaintiff in indorsing the draft and causing it to be collected was an acceptance of the compromise tendered by the defendant, which is binding upon her. The plaintiff insists that the contract of insurance requires the defendant to pay its share of the loss in full, and denies that she has in any manner compromised her right to recover that amount. The facts upon which the defendant bases its claim that the draft represented the full amount of its liability to the plaintiff are alleged to be substantially as follows: The defendant was a mutual company, and depended chiefly upon the assessment of premium notes for money with which to pay its losses. Its premium notes and money on hand at the time of the loss in question amounted to about five thousand dollars, and in addition it had about twenty-three thousand dollars in deposit notes. It could collect only about twenty per cent. of its notes during any period of ninety days. It had sustained other losses at about the same

time, and the resources available for the payment of all its losses within the time required by the policies was but a little more than sixty per cent. of the total amount for which it was liable. The amount of the draft was more than sixty-seven per cent. of the amount due the plaintiff. The defendant further claims that the settlement it tendered was in accordance with the statutes of this state which must be regarded as a part of the contract of insurance. The plaintiff contends that the policy of insurance provided for the absolute payment of the full amount of the defendant's share of the loss, and that the amount to be so paid was not contingent upon the proceeds of any assessments.

Whether the claim that the amount tendered by means of the draft was all that the plaintiff was entitled to recover under the policy is well founded we need not determine. It is clear that the defendant claimed that such was the case, and that the draft was sent to be delivered to the plaintiff only in case it should be received by her as payment in full. She knew the claim of the defendant, and was fully advised in regard to the condition on which she was to receive the draft. The Kearney Savings Bank was the special agent of the defendant, with authority only to have the plaintiff sign the receipt which we have set out, and, when that was done, to deliver to her the draft, and return to the defendant the receipt. She knew, therefore, that the draft was tendered, not as payment of a larger sum which the defendant recognized to be due, but as full payment for all it admitted to be due, and that she was entitled to it only on condition that she should accept it in full satisfaction of her claims under the policy.

It is said that the plaintiff, by indorsing the draft, and leaving it with the bank, did not intend to accept the terms on which it was offered, but that her purpose in so doing was only to place the amount to be collected

on the draft within the jurisdiction of a Nebraska court; therefore, that although her act was unauthorized and wrongful, yet it should not be given the effect of an assent to the compromise. In other words, plaintiff insists that, although her act indorsing the draft to the bank was not honest, but wrongful, yet it was intended to secure that to which she believed herself to be entitled, and that she should be permitted to profit by it. The plaintiff cannot be permitted to avoid the legal effect of her act on the ground urged. She had no right to indorse the draft excepting as owner, and had no right to deposit it in the bank excepting as owner. She had no authority to provide for its collection as the property of the defendant. She was not empowered to act for it any manner, and her attempt to make the Kearney Savings Bank its agent to collect the draft and hold its proceeds, that she might reach it by means of her attachment suit, was without effect. By indorsing the draft she accepted it, and agreed to the compromise which it was tendered to effect. The fact that she did not sign the receipt is not material, since she knew the condition on which alone she could acquire title to the draft. See *Burlington Gas Light Co. v. Greene*, 22 Iowa, 508, 509.

It is urged that the amount due under the policy was admitted to be two thousand, four hundred and seventy-seven dollars and twenty-seven cents; that an agreement to receive less than that amount as payment in full would have been without consideration, and of no effect, and that the acceptance of the draft by the plaintiff on the condition on which it was tendered would not have extinguished the debt. It is conceded that the board of adjusters fixed the defendant's share of the loss at two thousand, four hundred and seventy-seven dollars and twenty-seven cents, but it is not conceded that the defendant was at any time liable for the payment of that amount. On the contrary, the defendant claimed,

after the adjustment was made, that the plaintiff was only entitled to the proceeds of an assessment of the premium notes, which were less than the amount fixed by the adjustment. The district court was authorized to find that the parties disagreed as to the amount to which the plaintiff was entitled under the policy; that the draft was offered as payment in full, and as a compromise of the disagreement, and that by indorsing it the plaintiff agreed to the compromise. It is well established that the settlement of a disputed claim furnishes a sufficient consideration for the agreement of settlement. *Shaw v. C., R. I. & P. R'y Co.*, 82 Iowa, 199, 200, and cases therein cited; *Everts v. District Township of Rose Grove*, 77 Iowa, 37, 41; *McDaniels v. Bank of Rutland*, 29 Vt. 231; *Bull v. Bull*, 43 Conn. 455; *Potter v. Douglass*, 44 Conn. 541; *Berdell v. Bissell*, 6 Col. 163. We conclude that the district court was authorized to find that by the acceptance of the draft all liability of the defendant under the policy in suit was discharged.

The judgment of that court is therefore AFFIRMED.

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R. S. DELZELL, Appellee, v. BURLINGTON, CEDAR RAPIDS  
& NORTHERN RAILWAY COMPANY, Appellant.

**Justices' Courts: JURISDICTION: TITLE TO REAL ESTATE: PLEADING AND PRACTICE.** Where, in an action before a justice of the peace against a railroad company for damages to growing timber from a fire set out by the defendant, the plaintiff's petition alleged ownership of the land, *held*, that the question of the plaintiff's title to said real estate could not be raised by demurrer; and if raised by answer, the cause should be transferred to the district court for trial. Such an issue presents no ground for the dismissal of the case by the justice for want of jurisdiction.

*Appeal from Louisa District Court.*—HON. DAVID  
RYAN, Judge.

WEDNESDAY, OCTOBER 11, 1893.

ACTION at law to recover the value of certain growing timber alleged to have been destroyed by fire set out by the trains upon the defendant's railroad. The action was originally tried before a justice of the peace, and a judgment was rendered for the plaintiff. The defendant removed the cause to the district court, where the judgment of the justice of the peace was affirmed. The defendant appeals.—*Affirmed*.

*J. C. Leonard* and *S. K. Tracy*, for appellant.

*F. Courts*, for appellee.

ROTHROCK, J.—The amount in controversy in the action is forty dollars, and the case comes to this court upon a certificate of the trial judge that the cause involves new questions of law upon which it is desirable to have the opinion of this court. The following is a copy of the questions certified:

“*First*. Does plaintiff, claiming title and ownership of real estate [describing same] in his petition, and asking forty dollars for injury thereto by defendant, in a justice's court, tender an issue and make a case under article 11, section 1, of the constitution of the state of Iowa, where the question of title to real estate may arise?

“*Second*. Plaintiff claiming the title and ownership to real estate, and asking judgment for injury thereto in a justice's court, in his petition, must the defendant transfer said claim and issue so tendered by the plaintiff to the district court, or can he raise the question of the jurisdiction of the said justice by demurrer, and, when overruled, then, after denying plaintiff's title and ownership of said real estate and injury thereto by answer, move to dismiss, no affidavit being filed as provided by section 3535, Code of Iowa, for the reason that said justice has no jurisdiction under the constitu-

tion to try and determine the subject-matter at issue?

*“Third.* Was it plaintiff's or defendant's duty, where plaintiff by petition claimed title and ownership and injury to real estate, and defendant by answer denies said title, ownership, and injury to said real estate, and moved to dismiss, as the court had no jurisdiction, to move to transfer said cause to the district court?

*“Fourth.* Was it the duty of the justice, F. F. Curran, to dismiss said cause for want of jurisdiction, plaintiff claiming in his petition title and ownership to real estate, and injury thereto in the sum of forty dollars, defendant denying that plaintiff was owner or had title to said real estate, and moving to dismiss for want of jurisdiction, neither plaintiff nor defendant moving to transfer said cause to the district court?”

Counsel for the appellant appear to be of opinion that these questions present a grave constitutional question. We think no such question is presented. Of course, it is not to be supposed that anyone would claim that a justice of the peace can try the title to real estate. If a railway train sets out a fire by which timber land is injured, and an action is brought by the owner of the land before a justice of the peace to recover damages, the action may be maintained and tried, unless the defendant tenders an issue involving the title to the land, in the manner required by law. Section 3535 of the Code is as follows: “If the title to real property be put in issue by the pleadings supported by affidavit, or shall manifestly appear from the proof on the trial of the issue, the justice shall without further proceedings certify the cause and papers, with transcript of his docket showing the reason of such transfer, to the circuit (district) court, where the same shall be tried on its merits.” Instead of answering the petition, the defendant demurred thereto. The effect of a demurrer is to admit the facts pleaded, and con-

trovert their legal sufficiency. The demurrer, therefore, admitted that the plaintiff was the owner of the land, and tendered no issue on that question. It was properly overruled. The answer put in issue the ownership of land, and the defendant demanded that the action be dismissed. The record shows that a written motion was actually filed by the defendant demanding a dismissal, and a judgment against the plaintiff for costs. This motion was properly overruled for two reasons: First, because the defendant did not take issue upon the ownership of the land by a pleading supported by affidavit, as required by the section of the statute above cited; and, second, because no motion was made to transfer the cause to the district court. There can be no possible state of facts which authorizes a justice of the peace to dismiss the action on the ground that it involves the title to real estate. The idea that some method of practice other than that prescribed by law may be pursued before a justice of the peace is a mistaken notion.

These observations dispose of all the questions certified, and lead to the conclusion that the district court rightly held that the methods and rulings of the justice of the peace were not erroneous. **AFFIRMED.**

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89 211  
131 520

**CAMPBELL BANKING COMPANY, Appellee, v. E. J. COLE,  
Appellant.**

**Witnesses: COMPETENCY: TRANSACTIONS WITH PARTY DECEASED: FORM OF OBJECTION.** In an action brought by a banking company upon a promissory note, to which, it was alleged, the defendant's name had been signed, under his direction and authority, by his wife, since deceased, *held*, that a witness who was the owner of said bank, transacted all the business touching the execution of said note, and who was interested in the result of said action, was not competent to testify as to the circumstances that led to the making of said note, why the maker wanted the money, when it would be paid, and the

source from which it was expected to procure money for payment. Whether an objection to such evidence as "incompetent and immaterial" is sufficient to raise the question of the right of the witness to testify as to personal transactions with one deceased, *quære*.

*Appeal from Appanoose District Court.*—HON. W. I. BABB, Judge.

WEDNESDAY, OCTOBER 11, 1893.

ACTION on a promissory note. There was a verdict and judgment for the plaintiff. The defendant appeals.—*Reversed*.

*T. M. Fee*, for appellant.

*Tannehill, Vermilion & Vermilion*, for appellee.

KINNE, J.—The plaintiff sues on a promissory note, which it alleges was executed by the defendant, and one Ella Cole, his wife, since deceased. It is averred that this defendant's name was signed to said note by his wife by his direction and authority. In another count of the petition it is alleged that Ella Cole, believing she had authority so to do, did sign the defendant's name to said note, and that the defendant, being fully advised as to the facts, did ratify said signature, and make it his own. The defendant, under oath, denies the genuineness of his signature to said note, and denies all the allegations of the petition.

D. C. Campbell, the real plaintiff, was asked certain questions touching the acts and statements of the defendant's wife, Ella Cole, with reference to the note in question, and other notes in lieu of which it was given. After the examination of the witness with reference to said matters had proceeded for some time, objection was made to a question as "incompetent and immaterial." We are not required to determine whether an objection to this evidence as "incompetent

and immaterial" was sufficient to raise the question of the right of the witness to testify as to personal transactions or communications had with the deceased, and touching the matter in controversy.

Afterward a further objection was made, which clearly indicated that the ground of it was that the witness was not competent to testify as to personal transactions and communications had with the deceased, and relating to the note in suit. The objection was overruled. We think this ruling was erroneous. The evidence was inadmissible. It related to the execution of the note in suit, and the facts and circumstances that led up to it; why she and her husband, the defendant, wanted the money, when they would pay it, and the source from which they expected to procure money for the payment. Our statute provides: "No party to any action or proceeding, nor any person interested in the event thereof, \* \* \* shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, \* \* \* against the next of kin, of such deceased person." Code, section 3639. The witness Campbell was in fact the owner of the plaintiff company's bank, and transacted all the business touching the execution of the note in suit. He is interested in the event of this suit. As we have said, he was examined as to personal transactions and communications between himself and the defendant's wife, who died prior to the trial of this case. We held in *French v. French*, 84 Iowa, 655, that the words "next of kin," as used in the statute, included "relations by marriage, who are entitled by law to a distributive share in the estate of decedent." It follows, then, that the testimony was not admissible as against the husband.

It is said the evidence does not sustain the verdict. As the case must be reversed, and the testimony

on another trial may be different, the jury should be left free to come to their conclusion without any indication from this court as to its opinion as to the weight of the testimony adduced on the last trial.

The appellant argues the case in part upon the theory that it involves the question of an estoppel. No estoppel is pleaded, nor is it established by the testimony. The case as made, and as submitted to the jury, involved but two questions: *First*, did the defendant authorize his wife to sign his name to the note? And, *second*, did he assent to or ratify her act in signing his name to the note?

Complaint is made of the instructions given, and of the action of the court in refusing the requests of the defendant. The instructions given fully embody the law applicable to the case. Those asked, so far as proper, are covered by the court's charge.

For the error pointed out the judgment below is REVERSED.

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CARRA CAMERON, Appellee, v. J. C. BRYAN *et al.*,  
Appellants.

- 89 214  
111 579
1. **Personal Injury: HORSE FRIGHTENED BY DOG: EXEMPLARY DAMAGES: PLEADING.** In an action for damages for injuries sustained by reason of the plaintiff's horse being attacked by the defendant's dog on the public highway, whereby the horse was frightened and ran away, and the plaintiff was thrown upon a barbed wire fence, and injured, *held*, that an allegation in the petition that the defendants were the owners of the dog, and harbored and kept him "willfully, unlawfully and maliciously," with full knowledge of his vicious habits and practices, and made no effort to restrain him, nor to protect the public from his vicious attacks, was sufficient to support a recovery of exemplary damages, if established by the evidence. Whether proof of notice to the owner of the vicious character of the dog before the injury occurred is necessary to a recovery of actual damages in such case, *quære*.
  2. ———: ———: **REPUTATION OF DOG: EVIDENCE.** Evidence of the general reputation of the dog, in such case, as being vicious and dangerous, is competent as tending to raise an inference that the owner had knowledge of his vicious propensities.

3. ———: ———: EVIDENCE OF PREVIOUS HABITS: PLEADING: VARIANCE. It being alleged in the petition that the dog was in the habit of attacking, biting, chasing and frightening teams, *held*, that evidence that the dog was habitually frightening teams by chasing, barking, biting, or in any other way, was admissible, although the traits proven were not just the same as those averred in the petition; and the right of the plaintiff to recover in such case is not affected by the fact that the evidence fails to show that the dog has before committed the kind of act of which the plaintiff complains.
4. ———: ———: INSTRUCTIONS TO JURY. A cause will not be reversed in the supreme court because of technical objections to the charge of the trial judge to the jury, which could not have misled the latter in arriving at its verdict.
5. ———: ———: DAMAGES: VERDICT. A verdict of fifteen hundred dollars in such case as damages for a lacerated wound on the side of the face and neck of a girl about eighteen years of age, causing a permanent scar and disfigurement of the face, and much pain and suffering, both mental and physical, and necessitating medical attendance to the value of seventy-five dollars, besides nursing and the usual care and attention, is not excessive.

*Appeal from Dallas District Court.*—HON. J. H. APPLE-GATE, Judge.

WEDNESDAY, OCTOBER 11, 1893.

ACTION at law to recover damages for a personal injury, which the plaintiff claims she received by reason of the attack of a vicious dog, belonging to the defendants, upon a horse driven by the plaintiff and her sister, by reason of which attack the horse ran away, and the plaintiff was thrown upon a barbed wire fence, and was seriously and permanently injured. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendants appeal.—*Affirmed*.

*Shortley & Harpel*, for appellants.

The general vicious character of the dog was not the real question involved, and the admission of evidence of his general character was erroneous. It was only his character and habits as to committing acts similar to the one which is alleged to have caused

the accident and consequent injury that can be shown. *Keightlinger v. Egan*, 65 Ill. 236, 237; *Durrell v. Johnson*, 48 N. W. Rep. 891, 892. What people said about the dog chasing them in the road would neither tend to prove the fact that the dog was in the habit of attacking and biting animals being driven in the road, or that the defendants had notice that he was in the habit of so biting or attacking such animals. *Putney v. O'Brien*, 53 Iowa, 119. We can not presume from reputation the defendants' knowledge of a fact, and from such presumed knowledge infer knowledge of other and different acts, as this would be basing one presumption on another, which is not permitted. *United States v. Ross*, 92 U. S.; 283. "Presumptions must be based upon facts, and can not be drawn from other presumptions." 19 Am. and Eng. Encyclopedia of Law, 39 and note 3. See also page 56 and note 2; Wharton on Evidence [3 Ed.], par. 1226. The court's instruction that if the dog "was in the habit of running into the public highway and barking at and attacking \* \* \* or if you find that he was in the habit of doing any of these acts complained of," and defendants had notice thereof, they would be liable for the injury, if the dog caused the accident complained of, was erroneous. The court could not go farther than to tell the jury it was evidence tending to show liability, rather than establishing it. *Durrell v. Johnson*, 48 N. W. Rep. 891, 892. The twelfth paragraph of the charge is erroneous for that it authorizes the jury to allow, as an element of compensatory damages, mental pain and anguish; while such damages should be allowed only in a proper case for exemplary damages. *Deppe v. C., R. I. & P. R'y Co.*, 36 Iowa, 52; *Johnson v. Wells, Fargo Co.*, 6 Nev. 224; *Carl v. C., R. I. & P. R'y Co.*, 63 Iowa, 428; *Fitzgerald v. C., R. I. & P. R'y Co.*, 50 Iowa, 79; *Jones v. Marshall*, 66 Iowa, 739; *Brown v. Allen*, 35 Iowa, 306; *Collins v.*

*Council Bluffs*, 35 Iowa, 436; *Paine v. C., R. I. & P. R'y Co.*, 45 Iowa, 573. The plaintiff in her petition did not ask for exemplary damages.

*White & Clarke*, for appellee.

Upon the theory that it was essential to the appellee's right to recover damages, that knowledge of the vicious character of the dog on the part of appellants must be shown, the dog's general reputation in the community as a vicious dog was admissible. Knowledge of a fact is often held to be inferable from general neighborhood reputation of it, and it has been so held in cases like the one at bar. *Fake v. Addicks*, 45 Minn. 37; 47 N. W. Rep. 450; *Mier v. Shrunk*, 79 Iowa, 19; *Lee v. Kilburn*, 3 Gray, 594. The fact that the dog was gotten and kept for the purpose of a watch dog is sufficient to warrant the inference that defendants knew that the dog possessed the qualities that would make him valuable as a watch dog. *Brice v. Bauer*, 108 N. Y. 428. A man can not keep a dog of vicious habits, whatever they may be, which endangers the safety of his neighbors. If from any of his acts or conduct, they, as reasonably careful and prudent persons, might have known of the vice, they would be responsible for his acts. The gist of the action is in the keeping of the animal with the vice producing the injury, with knowledge of it. It is immaterial what the vice is, so it causes the injury. *Schmid v. Humphrey*, 48 Iowa, 656; *Dochery v. Hutson*, 125 Ind. 102; *Graham v. Payne*, 24 N. E. Rep. 216; *Lyons v. Merrick*, 105 Mass. 71; *Marsel v. Bowmon*, 62 Iowa, 57; *Mier v. Shrunk*, 79 Iowa, 19; *Knowles v. Mulder*, 41 N. W. Rep. 896; *Brice v. Bauer*, 108 N. Y. 428; *Godeau v. Blood*, 52 Vermont, 251; *Rider v. White*, 65 N. Y. 54. It is not a question of "negligence," but a question of imputed knowledge, from proved facts which would have led reasonably careful persons to such

knowledge. Appellants contend that compensatory damages, for mental pain and anguish can be allowed only in a proper case for exemplary damages. Such is not the law in Iowa. *Ferguson v. Davis Co.*, 57 Iowa, 601; *Lucas v. Flinn*, 35 Iowa, 9; *Parkhurst v. Mastellar*, 57 Iowa, 475; *McKinley v. C. & N. W. R'y Co.*, 44 Iowa, 314. Exemplary damages are simply an element in damages, and are recoverable upon proof under a prayer for "damages." *Gustafson v. Wind et al.*, 62 Iowa, 284. If the dog was kept by the defendant with knowledge of the vicious habit in question, in utter willful and reckless disregard of the rights of others, the jury would have been authorized under the allegations of the petition to award exemplary damages. *White v. Spangler*, 68 Iowa, 225; *Reddin v. Gates*, 52 Iowa, 211; *McCord v. High*, 24 Iowa, 247; *Parkhurst v. Mastellar*, 57 Iowa, 480. The damages allowed were not excessive. Compensation is not only made for loss of time, for the broken cart, for physical pain, but for disfigurement, mental pain, humiliation and anguish, flowing from the wrongful act. *W. & A. K'y Co., v. Young*, 7 S. E. Rep. 912; *Heddles v. C. & N. W. R'y Co.*, 77 Wis. 228; *Sherwood v. C. & W. M. R'y Co.* 82 Mich. 374.

ROTHROCK, J.—I. It is not disputed that the defendants were the owners of the dog which it is claimed caused the injury of which the plaintiff complains. The defendants reside on a farm in Dallas county, and their dwelling house is near a public highway. There is no question but that the plaintiff received a very severe injury by being thrown from a cart in which she was riding, onto a barbed wire fence; and the evidence shows without much question that the injury occurred by reason of the fright of the horse by the defendant's dog, and the evidence fully justified the

1. PERSONAL injury: horse frightened by dog: exemplary damages: pleading.

jury in finding that neither the plaintiff nor her sister was chargeable with any negligence which proximately contributed to the injury.

It is provided by section 1485 of the Code that, "it shall be lawful for any person to kill any dog caught in the act of worrying, maiming or killing any sheep or lambs or other domestic animal, or any dog attacking or attempting to bite any person, and the owner shall be liable to the party injured for all damages done by his dog, except when the party is doing an unlawful act." Much of the evidence in the case is directed to the question whether the dog of the defendants was a vicious and dangerous animal by reason of his propensity to attack and frighten teams driven past the defendants' premises, and whether the defendants had notice of such habits in the dog prior to the time that the plaintiff was injured. The court below appears to have been of opinion that a recovery could not be had for any amount, unless the defendants had notice of the vicious character of the dog before the injury occurred. It may be questioned whether this is the rule as to the actual damages, and it may be that the instructions to the jury on that feature of the case were more favorable to the defendants than they were entitled to. We do not determine that question, because the said instructions are the law of the case. And it may be further observed in this connection that it was averred in the petition that the defendants were the owners of the dog, and that they harbored and kept him "willfully, unlawfully, and maliciously," with full knowledge of the ferocious and vicious habits and practices of said dog, and made no effort to restrain him, or to protect the public from his vicious attacks. This laid the foundation for the recovery of exemplary damages, if the willful and malicious harboring of the dog could be established by the evidence. In view of these averments of the petition, the evi-

dence of the defendants' knowledge of the vicious propensities of the dog was proper. And we may say here that the objection of the appellants that the petition did not contain the necessary averments to recover punitive damages is not well taken. It was not necessary to do more than make a general claim for damages to which the plaintiff was entitled, actual as well as exemplary.

II. The plaintiff introduced evidence to the effect that the dog had the general reputation of "chasing people in the road," and "annoyed people passing in the road considerably," and that the "character of the dog did not seem to be very good." It is competent to show the general reputation of the animal as being vicious and dangerous as tending to raise an inference that the owner had knowledge of his vicious propensities. 1 Greenleaf on Evidence, section 101; *Meier v. Shrunk*, 79 Iowa, 17; *Murray v. Young*, 12 Bush, 337; *Keenan v. Hayden*, 39 Wis. 558.

III. We do not understand counsel to object so much to the admissibility of evidence of the general reputation of the animal, as that the traits of character developed by the evidence are not the same as those set forth in the petition. It is averred in the petition that the dog was in the habit of attacking, biting, chasing and frightening teams, and it is claimed that evidence that he would chase them in the road did not support the averments of the petition. This position does not appear to us to be well taken. Evidence that the dog was habitually frightening teams by chasing, barking, biting, or in any other way, was competent; and the same thought is sufficient answer to the claim that the verdict is contrary to the evidence, because

2. —: —: rep-  
utation of dog:  
evidence.

3. —: —: evi-  
dence of pre-  
vious habits:  
pleading: va-  
riance.

tiff alleges the defendants are liable. It is claimed by the plaintiff, and there is abundant evidence to establish the fact, that the dog not only chased and ran at the horse, but that he grabbed and bit him. Now, it is true that there was no evidence that the dog had before that actually bit a team, or a horse in a team, but there was abundant evidence that he was just that kind of a howling nuisance which is a menace to the traveling public, and a terror to restive and nervous horses.

IV. Exceptions were taken to the greater part of the charge given by the court to the jury, and to the refusal to give certain instructions asked

4. —: —:  
instructions  
to jury.

by the defendants. We have carefully examined these objections, and find no error in the respects claimed. Some of them are founded upon the thought that the court charged the jury upon facts of which there was no evidence; others are criticisms upon the structure of sentences in the instructions, and the meaning thereof. They are criticisms which are based upon reasoning which is too refined for practical application in the administration of justice. It is unnecessary to separately discuss them. The charge to the jury is a full, clear, and concise statement of the law applicable to the case, and we discover nothing erroneous in it, and nothing which could possibly mislead the jury from a proper consideration of the facts as applied to the law.

V. The jury returned a verdict for one thousand, five hundred dollars. It is claimed that this amount

5. —: —:  
damages:  
verdict.

is excessive. The plaintiff is a young girl, now about eighteen years old. The injury she received by contact with the barbed

medicine sixteen years. Treated plaintiff from time she was hurt. I found her suffering from what was supposed to be a lacerated wound; that is, on the left side of the face at the angle of the jaw, and extended four inches, possibly four and one half, in length, and one half or three quarters deep. The wound was gaping, and edges were very ragged and lacerated. I think I could place the index finger full length in the wound, and not more than be even with the margin of surface. There were no hemorrhage. They had staunched that with a handkerchief. You could see the external coats of the blood vessels. Pain was marked. I think about thirty stitches were required. Think wound was at least one half or three quarters of an inch longer than the scar. Think I visited her three times before she came to Perry, once each day. Fever was marked, but not severe. Indications of pain were marked. Visited her to the ninth, and possibly to the eleventh day, twice a day after she came to Perry. Dressed the wound each time. Fever symptoms continued until about the eleventh day. It was somewhat over a month, think not quite, when I paid her the last visit. However, I made her one visit after she was taken from Perry. There was a tendency to form a sinus, an open tube, reaching from the wound to the surface. These indications continued until I succeeded in removing them two or three weeks after she went home. I saw her last, some time in December. Wound was not entirely healed; was discharging. Have given her treatment since that time, electrical in character, with the intention of absorbing the growth that seemed to roll out between the lips of the wound. The scarred condition of her face as it appears now is permanent." The bill paid for medical services was about seventy five dollars. Add to this the proper compensation for the necessary nursing, care, and attention, and to this add the pain and suffering, mental and physical, and

above all the fact that the plaintiff must go through life with her face disfigured, and it can not be said that the verdict is excessive, even if it be founded upon actual damages. **AFFIRMED.**

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**S. M. MOORE, Administrator, Appellee, v. KEOKUK & WESTERN RAILWAY COMPANY, Appellant.**

1. **Negligence: DAMAGES: VERDICT.** A verdict of six hundred dollars for the negligent killing of a man seventy-one years of age, whom the evidence shows to have been of such industrious and economical habits that he might have earned more than a living in the management of his eighty acre farm, is not excessive.
2. **Railroads: PERSONAL INJURY: CONTRIBUTORY NEGLIGENCE: EVIDENCE.** In an action to recover damages for the negligent killing of a man at a highway crossing, it appeared that the highway approached the crossing by a gradual descent until within thirty or forty feet of the railroad, from which point the road was level; that when the deceased was within thirty or forty feet of the crossing he could have seen the approaching train if he had looked, and that the train must then have been more than two hundred feet distant; that the dangerous character of the crossing was known to the deceased, but it did not appear that he stopped to look if any train was approaching, and according to the undisputed evidence of two witnesses he approached the crossing with his horse on a trot. *Held*, that the evidence of contributory negligence was such that a verdict for the plaintiff must be set aside.

*Appeal from Appanoose District Court.*—HON. W. I. BABB, Judge.

WEDNESDAY, OCTOBER 11, 1893.

THE plaintiff states as his cause of action that on October 20, 1890, while deceased was using due care, the defendant negligently ran a train of cars and engine against the deceased, whereby he was killed; that the defendant was not only negligent in operating said train, but did, at the time, maintain a defectively con-

80	223
96	705
89	223
108	435
89	223
117	674
89	223
122	221
89	223
124	51

structed highway crossing. The plaintiff asks judgment for ten thousand dollars. The defendant answered, denying generally, and upon these issues the case was tried to a jury, resulting in a verdict and judgment for the plaintiff for six hundred dollars. The defendant appeals.—*Reversed*.

*F. T. Hughes and Tannehill, Vermillion & Vermillion, for appellant.*

*Gray D. Porter, for appellee.*

GIVEN, J.—I. At the close of the evidence on behalf of the plaintiff the defendant moved to take the case from the jury upon two grounds,  
1. NEGLIGENCE: damages: verdict. namely, because no damage to the estate of deceased had been shown, and because the evidence showed that the deceased was guilty of negligence directly contributing to the cause of his death. The motion was overruled, to which the defendant excepted. These questions were preserved in the further progress of the case, and are the only ones urged in argument by the appellant.

The appellant's claim as to the measure of damages is stated thus: "It is such damages as the estate of the deceased suffered pecuniarily by his death. Nothing can be allowed on account of pain and suffering and distress of his family on account thereof, or for loss of his society. His occupation, annual earnings, age, health, habits, and estate may be shown as affecting the question of damages. His probable earnings, less his expenses, constitute the measure of his damages." The instructions given are in accord with this statement of the rule and the authorities cited. No complaint is made against the instructions, but the contention is that the evidence showed that because of his advanced age, seventy-one years, and consequent infirmities, the deceased was incapable of earning more

than a living, and in a few years would have become incapable of earning anything. It is unnecessary that we here discuss the evidence. It is sufficient to say that it was a question of fact for the jury, and that there was evidence tending to show that his industrious and economical habits were such that the deceased would have earned more than a living in the management of his eighty acre farm. Under the evidence we would not be warranted in setting aside the verdict because of the damages allowed.

II. In considering the question of contributory negligence it is necessary to notice the facts with care.

The defendant's railroad runs southeast from Centerville, crossing an east and west public highway, about two miles southeast of the city, at what is known as "Brannon's Crossing." Two other highway crossings are passed between Brannon's crossing and the city. Brannon's crossing is at the southeast end of a railroad cut six hundred and sixty feet long. The surface in the northwest angle between the railroad and the highway is high, covered with brush, and prevents a view of the railroad from the highway towards the city for some distance until near the crossing. Most of the evidence relates to experiments made for determining at what point in the highway, west of the crossing, a train could be seen approaching from the city, and at what distance from the crossing. The evidence shows without conflict that the sides of the cut were sloping; that the view of the track became more extended as you approached the crossing from the west, and that when within fifteen to twenty feet of the crossing the track is in full view up to the city. We need not discuss the various experiments in detail. It is sufficient to say that they show that a person seated in a buggy, such as the deceased was in, at a point in the highway

2. RAILROADS:  
personal injury:  
contributory negligence:  
evidence.

forty-five feet west of the crossing, could see the smoke-stack and a little of the top of the boiler of an engine standing three hundred and thirty feet northwest of the crossing, and that the view expands as you near the crossing. It also appears that the railway could be seen from the highway, west of the high ground spoken of, for some distance north of the cut. The deceased resided a short distance west of the crossing, and was familiar with it and the time of trains. On the forenoon of October 20, 1890, accompanied by his wife and grandson, he started east on the highway in a low phaeton drawn by one horse. Mrs. Brannon was seated with her husband, and the boy was standing on the hind axle or spring. They were seen by a man at a distance to approach the crossing at a trot. The train, consisting of engine, baggage car, and two coaches, left Centerville at 8:44 A. M., twenty-nine minutes late, and approached Brannon's crossing at a speed of about forty miles an hour. The engine struck the buggy between the wheels, injured the horse, and instantly killed all three occupants.

There is no evidence whatever to sustain the charge that the crossing was defective, or that its condition was the cause of the accident. There was a ditch about six feet wide along the west side of the railroad. This was bridged with plank fourteen feet long, laid parallel with the rails, thus narrowing the wagon track, but affording ample width for crossing, but not for turning. The jury must have found that the train was negligently operated, in that no warning signal was given of its approach to the crossing. There is a conflict in the evidence on this subject, but, as the appellant does not question this finding in argument, we are not called upon to consider it, except as it relates to the question whether or not the deceased was negligent.

The highway approached the crossing from the

west by a gradual descent until within about thirty or forty feet, from which point the road was level. There was nothing to prevent stopping and standing a team in the road at any point west of the crossing. The only direct evidence as to the actions of those in the buggy is that of the witness who saw them from a distance and the engineer. The first witness saw them coming down the hill at a trot, but could not see them at the crossing. The engineer states that when within two hundred feet of the crossing he saw the horse's head approaching the crossing at a trot, thirty or thirty-five feet from it. Saw that there were people in the buggy. "I could see them looking right at me." He also states that he did all he could to stop the train, giving in detail what he did.

The foregoing are the material facts, and are unquestioned in the evidence. It is from them that we are to determine whether the deceased was guilty of negligence contributing to his death. The rule as to the care which the deceased was required to exercise is stated in *Nixon v. C., R. I. & P. R'y Co.*, 84 Iowa, 331, as follows: "It is conceded by counsel for the appellant that, ordinarily, there is no excuse for one about to cross a railroad track to recklessly drive upon the crossing without stopping and looking and listening for an approaching train; and this rule has so frequently been announced by this court, as well as the courts elsewhere, that we need not cite the cases. Probably as clear a statement of the rule as has been made is to be found in *Pierce on Railroads*, page 343. It is as follows: 'A traveler upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing in order to avoid a collision. This precaution is dictated by common prudence. He should listen for signals, and look in the different directions from which a train may come. If, by neglect of his duty, he suffers injury from a passing train,

he can not recover of the company, although it may itself be chargeable with negligence, or have failed to give the signals required by statute, or be running, at the time, at a speed exceeding the usual rate.'” See, also, *Haines v. Ill. Cent. Railway Co.*, 41 Iowa, 227. This rule has been so repeatedly and uniformly announced as not to require further citation.

It was the duty of the deceased to look and listen for trains before going upon the crossing. This crossing was known by him to be unusually dangerous, and therefore it was his duty to exercise greater care. That he did not hear the train in time to avoid the collision is evident from the fact that it occurred, for he surely would not have gone into the danger had he known of it in time to avoid it. The question is whether, by the exercise of care, he could have known of it in time to avoid the collision. The fact that the train was behind its schedule time did not warrant him in presuming that it had passed, or excuse him from listening and looking. Trains are often behind time, and railroad companies have a right to run trains over their tracks at any time. No one survives to tell whether or not the deceased stopped to listen, or listened without stopping. The witness who saw him coming down the hill on a trot says he continued at that gait as long as he could see him. The engineer says the horse was trotting when he first saw him. The distances and speed of the train and horse indicate quite clearly that the deceased did not stop to listen.

The deceased had a right to act upon the presumption that the usual warning signals for the crossing would be given. We have seen that according to the finding of the jury the signals were not given, and hence it is argued that the deceased could not hear the approaching train, even by stopping and listening. In the absence of signals, the only warning to be heard was the usual noise of the train running into and

through the cut. Whether by attentive listening, the deceased could hear the noise of the train, depended on the direction of the wind, and the effect of the walls of the cut, and the high ground that obstructed the view. The facts do not warrant the conclusion that in the absence of signals the deceased could have heard the train in time to have avoided the accident, or that he did not listen. Evidence that signals were given at the two crossings between the place of the accident and the city is uncontradicted; but it does not appear that those signals could be heard by the deceased, or that he was required to act upon them.

We now inquire whether, from the evidence, it appears that, by the exercise of care, the deceased could have seen the train in time to have avoided the collision. He could not have seen it from the point where the track was in sight, west of the high ground in the angle, because it is clear from the speed of the train and buggy that the train had not reached that point of view until after the deceased had passed it. His next opportunity for seeing the train was forty-five feet west of the crossing. This is the longest distance given by any of the experiments. From that point of view the train would be seen three hundred and forty-four feet from the crossing. Here again, it is evident from the speed of the train and buggy that the train had not reached that point when the deceased passed the point forty-five feet west of the crossing. While the engineer was not in a position to estimate distance accurately, his evidence is entitled to careful consideration. Though his statement of distances may not be exact, his statement that he was watching, that he saw the horse going at a trot, then the buggy and people in it looking at him, are statements of facts. If he was watching as was his duty, he must have seen the buggy and people as soon as they could have seen the train. As the view of the track enlarges as you near the crossing, it is

evident that the buggy must have been thirty or more feet from the crossing when first seen, and the train more than two hundred feet. Had the deceased been looking at that time, he must surely have seen the train in time to stop. The statement of the engineer that the people were looking at him has reference to a moment later, when he was hurrying from his seat to reverse the engine, and when it was too late to stop the trotting horse. The deceased had opportunity to see the train and avoid the danger, but he did not. But one conclusion can be reached from the facts, and that is that the deceased was negligent in going upon that crossing when and as he did, and that his negligence contributed to cause his death. REVERSED.

89	230
107	384
89	230
117	521
89	230
127	720
89	230
139	453

CAWKER CITY STATE BANK, Appellee, v. WM. JENNINGS,  
AND ANNA JENNINGS, Intervenor, Appellants.

1. **Attachment; AMENDMENT TO PETITION: EFFECT.** Where in an action by attachment upon a promissory note the defendant answered, under oath, denying the signature to the note, or that he authorized the same, and thereupon the plaintiff amended his petition by adding a second count, asking to recover upon an open account in the same amount, and alleging that said count was upon the same cause of action as set out in the original petition, and upon this count the jury found that the plaintiff was entitle to recover, *held*, that the attachment was not wrongfully sued out because of the plaintiff's failure to recover upon the count in his original petition.
2. ———: ———: ———. Both of said counts of the petition being upon the same cause of action, *held*, that a counterclaim for malicious prosecution, which had not matured at the time of the filing of the original petition, was not available as against said second count.
3. ———: **GROUND: NONRESIDENCE: EVIDENCE.** A farmer temporarily residing in this state for the purpose of feeding cattle, with the expectation of ultimately returning to Kansas, where his wife and children resided, is not a resident of this state.
4. **Special Verdict: RIGHT TO HAVE INTERROGATORIES SUBMITTED TO JURY.** The refusal to submit to the jury an interrogatory bearing upon an important question in a cause, and incident to the main issues, but not calling for the determination of an ultimate fact, is without

prejudice, when such inquiry is covered by the instructions to the jury, and by special findings to other interrogatories.

5. **Attachment; INTERVENTION.** The attachment herein being valid under the amendment to plaintiff's petition, *held*, that a petition of intervention claiming the attached property under a conveyance made after the levy of the attachment under the original petition, but before the filing of the amendment was properly dismissed.

*Appeal from Harrison District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

THURSDAY, OCTOBER 12, 1893.

JUNE, 15, 1891, the plaintiff commenced this action to recover of the defendant two thousand dollars and interest upon a promissory note for that amount, dated December 4, 1890. The plaintiff also sued out an attachment, alleging as ground therefor that the defendant was a nonresident of the state of Iowa. The defendant answered under oath denying that he signed or authorized the signing of his signature to said note, and asking by way of counterclaim to recover damages for the wrongful suing out of said attachment. Thereupon the plaintiff amended the petition by adding a second count, asking to recover on account for money advanced and loaned to the defendant, with interest, amounting to two thousand dollars, and alleging that said count was for the same cause of action set out in the original petition. The defendant filed his amended and substituted answer, denying the execution of the note, and that he was indebted to the plaintiff on the account. He asked, by way of counterclaim, damages on the attachment bond for the wrongful suing out and levy of the attachment. He also asked, as counterclaim to the cause of action set up in said second count of the petition, damages for an alleged malicious prosecution for selling and concealing mortgaged property. The plaintiff's demurrer was sustained to this last mentioned counterclaim. The defendant

moved that the plaintiff be required to elect upon which count of the petition it would proceed to trial, which motion was overruled. Thereupon the case was tried to a jury upon the issues joined, and a verdict returned in favor of the plaintiff on the second count for one thousand, nine hundred and eighty-six dollars and fifty cents. Special findings were also returned, showing that the jury found for the plaintiff on said second count, and finding that the defendant was not a resident of this state when the attachment was sued out, that it was not wrongfully sued out, and that the defendant was not entitled to damages on his counterclaim for a wrongful suing out of the attachment. While the action was pending, the attached property was sold as perishable, and the proceeds held to await the result of the litigation. After verdict, and before judgment, Anna Jennings intervened, claiming the proceeds of the sale under a bill of sale from the defendant, made September 15, 1891. The plaintiff's motion to dismiss the petition of intervention was sustained, and the defendant's motion for a new trial overruled. Judgment was entered for the plaintiff on the verdict, and that the proceeds of the sale of the attached property be applied thereon, and that any surplus be paid to intervenor. The defendant and the intervenor appeal. **AFFIRMED.**

*E. Duffy and S. H. Cochran, for appellants.*

*D. M. Thorpe and H. H. Roadifer, for appellee.*

GIVEN, J.—I. The attachment in this case was issued upon the plaintiff declaring that defendant was indebted as charged in the first count of the petition. The sole issue joined on that count was whether the defendant executed the promissory note therein declared upon. If he did, he was indebted in the amount evidenced by

1. ATTACHMENT:  
amendment  
to petition:  
effect.

the note; if he did not, the plaintiff was not entitled to recover on that count. The plaintiff was not entitled to an attachment unless there were more than five dollars due on its demand. Code, section 2953. The jury found against the plaintiff on the first count, or, in other words, failed to find that there was anything due to the plaintiff on its demand as stated in said first count. If this was all that appeared in the record, it would be clear that the attachment was wrongfully sued out. We have seen, however, that after the attachment was sued out and levied, and after the defendant had denied that he executed the note, the plaintiff amended, setting up the same cause of action in a second count in the form of an account for money advanced and loaned subsequent to October 11, 1890, which was due and unpaid at the time this action was commenced, and recovered thereon.

Several of the errors assigned by the appellants rest upon the claim, that the plaintiff's right to an attachment depended upon its being entitled to recover upon the first count; that the second count presented a new and different cause of action, and, therefore, was subject to be offset by the defendant's counterclaim for damages for malicious prosecution, to which the demurrer was sustained. The omission of sections 2934 and 2936 of the Revision from the Code of 1873 remits parties to the common law rule allowing the same cause of action to be pleaded in different counts. *Pearson v. Mill. & St. P. R'y Co.*, 45 Iowa, 498. The plaintiff expressly states in the second count that it is for the same cause of action stated in the first. The reason for the amendment is shown by the uncontradicted evidence that the plaintiff prepared the note to cover what is claimed on the account, sent it to the defendant by mail for execution, and received it back by mail, purporting to be duly signed. The defendant denied under oath that he had signed or authorized the

signing of his name; and the plaintiff, having no witness to the signing, amended, setting up the account which formed the consideration for the note, alleging that it was due at the commencement of the action, and asking to recover on one or the other count. The cause of action was the indebtedness. If the note was genuine, it evidenced that indebtedness; if not, then the account and the checks or other writings upon which it was based were the evidence. See *Pearson v. Mill. & St. P. Railway Co.*, 45 Iowa, 498. *Young v. Broadbent*, 23 Iowa, 539, is not in point. In that case the amendment not only set up a distinct cause of action from that originally pleaded, and upon which the attachment was issued, but one that was inconsistent therewith, and which did not exist at the time the attachment was sued out. It was held, under the facts of that case, that by the amendment the plaintiff had abandoned his first cause of action, and that the attachment, therefore, was wrongfully sued out. In *Leekins v. Nordyke & Marmon Co.*, 66 Iowa, 472, the plaintiff pleaded in one count a contract as made with the defendant, and as made with the defendant's agent, and ratified by the defendant. It was held that the plaintiff could have been required to elect on which allegation he would rely, or to set them out in different counts, but, as that was not done, both questions were properly submitted to the jury. *Bundy v. McKee*, 29 Iowa, 253, holds that an insufficient statement of a ground for an attachment is not cured by an amendment filed after the attachment issued, stating a sufficient cause as existing at the time of the amendment. "The affidavit should, therefore, have shown that the cause alleged existed at the time the action was commenced or the writ issued." The amendment in this case does show that the cause therein stated, the indebtedness, did exist at the time this action was commenced and the writ issued. The second count of

the plaintiff's petition does not state a distinct and different cause of action from that stated in the first, but the same in a different form. It follows, therefore, that the defendant's motion to require the plaintiff to elect on which count it would proceed was properly overruled, and that a recovery upon the second count sustains the plaintiff's right to the attachment so far as there being a debt due is concerned.

II. It follows from the conclusion just announced that the demurrer to the defendant's counterclaim for damages for malicious prosecution was  
2. —: —: —. rightfully sustained. "No action can be maintained for malicious prosecution until the action complained of is ended." *Brooks v. Westover*, 65 Iowa, 369. The prosecution complained of was not ended until September 3, 1891; therefore, the defendant had no cause of action prior to that date. To be available as a counterclaim, this cause of action must have been held by the defendant when this suit was commenced, June 15, 1891. Code, section 2659. The second count not being a new or different cause of action, the defendant was not entitled to maintain this counterclaim as against it.

III. Our conclusion also answers the appellant's objection to the fourth and seventh paragraphs of the charge given, and to the refusal to give  
3. —: grounds: the fourth instruction asked. The third  
nonresidence: evidence. instruction asked was fully covered by those given, and, therefore, was properly refused. The court submitted the question, whether the defendant was a nonresident of this state at the time the attachment was sued out, to the jury. The appellant contends that the uncontroverted evidence shows that he was then a resident of this state, and that the jury should have been so instructed. The evidence set out in the appellant's abstract might be construed as showing residence in this state, but the cross-examination of

Mr. Jennings, set out in appellee's abstract, which is not denied, shows quite clearly that he was not a resident of this state. He says that his wife and five children then, and continuously before, lived in Kansas, and never lived in Harrison county, Iowa; that corn was short in Kansas, and he came to Iowa temporarily for the purpose of feeding cattle, with the expectation of returning when he got through feeding, and that while here he made his home at Mr. Osborn's. There was no error in submitting the question of residence, nor in the finding that the defendant was not a resident of this state.

IV. The defendant complains of the refusal to submit the following special finding: "Was it understood and agreed that the two thousand

4. SPECIAL VERDICT: Right to have interrogatories submitted to jury.

dollar note of October 11, 1890, should be credited to the defendant, to be drawn on by him?" This is not the note set out in the first count, but one of several given by the defendant in the course of his dealings with the plaintiff. The question asked to be submitted, though important, is not as to an ultimate fact, but an incident to the main issues. This inquiry was fully covered by instructions, and embraced in the special findings submitted. We see no prejudice to the defendant by the refusal. *Phoenix v. Lamb*, 29 Iowa, 352.

V. The claim of the intervenor to the proceeds of the sale of the attached property, under the bill of sale to her of September 15, 1891, rests upon the contention that under the findings of the jury there was nothing due under the first count, and, therefore, the attachment was wrongfully sued out, and gave no interest to the plaintiff in the attached property. We have held that the recovery on the second count sustains the attachment, so far as there being a debt due at the time the writ was sued out, and as, under the findings of the jury, the attachment was

5. ATTACHMENT: intervention.

authorized in other respects, it follows that the intervenor's petition was properly dismissed.

This disposes of all questions presented, and leads us to the conclusion that the judgment of the district court must be **AFFIRMED**.

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**JOHN DOUD, JR., Appellee, v. CALEB H. BLOOD et al., Appellants.**

89	237
118	328

1. **Tax Title: VALIDITY AGAINST PRIOR MORTGAGE: REDEMPTION BY GRANTEE OF MORTGAGOR: DELAY IN PROCURING DEED.** A tax deed, issued eleven years after the tax sale, to the grantee of one who was the owner of said property at the time of the sale, will not give to said grantee, and those claiming under him, a title to said real estate superior to a mortgage made by said owner, and which was duly recorded prior to the conveyance to said grantee.
2. **Practice in Supreme Court: QUESTIONS CONSIDERED ON APPEAL.** The supreme court will not consider mere questions of proper computation of the amount of a decree in an equity cause unless the matter has been presented specifically to the district court.

*Appeal from Webster District Court.*—HON. S. M. WEAVER, Judge.

THURSDAY, OCTOBER 12, 1893.

THIS is a suit in equity to foreclose a mortgage upon certain real estate. There was a decree for the plaintiff. The defendants appeal.—*Affirmed*.

*A. E. Clark and R. M. Wright*, for appellants.

*A. N. Botsford and John Doud, Jr.*, for appellee.

ROTHROCK, J.—The mortgage which the plaintiff seeks to foreclose was made by Caleb H. Blood to one Norton on the twenty-eighth day of July, 1879. The plaintiff is now the owner of the mortgage, and it appears to have been given to secure the payment of an honest debt. It is true that it is claimed the mort-

gage was without consideration, and that the claim of the plaintiff is in other respects invalid, but there is no foundation in the record or evidence for any such contention. The mortgage was upon two hundred acres of land in Webster county. Caleb H. Blood, the mortgagor, entered the lands in the year 1858, at the proper United States land office, and they were duly patented to him. In the year 1869 said land was sold by the county treasurer for the delinquent taxes for the year 1868. Blood, the mortgagor, at the time he entered the land, was a nonresident of this state, and at all times since that date he has been a nonresident. His business in connection with his land in paying taxes was managed by agents. At one time one Soule was his agent. At another time E. G. Morgan was his agent. Some time before the expiration of the three years allowed for redemption from the tax sale, Soule, who was then acting as agent for Blood, made an arrangement by which he gave his promissory note to the First National bank of Ft. Dodge for the sum of one hundred and thirty dollars, which was used in purchasing the tax sale certificates for Blood. Morgan signed the said note as surety, and the tax sale certificates were left with Morgan to secure him for signing the note as surety. Soon, thereafter, Soule died, and Morgan paid the note to the bank. Blood had knowledge of the facts, and in 1874 he paid Morgan the principal part of said indebtedness. Blood was in Ft. Dodge in 1879, and effected a settlement of the amount yet due to Morgan, and an agreement was made between them by which Blood was to pay to Morgan seventy dollars in full, and Morgan was to deliver the certificates to Blood. Shortly after this agreement was made, Morgan, during his absence from home, left the certificates with his brother, with directions to surrender them to Blood upon the payment of the seventy dollars. Very soon after this agreement was made, and on the twenty-eighth

day of July, 1879, A. H. Clarke paid to the brother of Morgan the sum of seventy dollars, and took an assignment of said certificates to one Adams, and on the fourth day of September, 1880, said certificates were presented to the treasurer of the county, and a tax deed was made to said Adams. Before that, and in 1879, Blood made a quitclaim deed for said lands to D. R. Blood, and in November, 1880, D. R. Blood quitclaimed the land to Adams. The parties defendant who are resisting the foreclosure of the plaintiff's mortgage are the said Adams and Emeline Campbell, one of his grantees.

I. It will be apparent, from the foregoing facts, that the defendants can not resist the foreclosure of the mortgage because of the conveyances made by Blood. The plaintiff's mortgage was filed for record before any of the said conveyances were made. The defendants claim title to the land as against the plaintiff's mortgage because of the tax deed to Adams. It is true that the said Emeline Campbell claims title under subsequent tax sales. But these sales and deeds were made at a time when she was under a legal obligation to pay the taxes, and can not be allowed to affect her title under the tax deed to Adams and the conveyances from Blood. There is enough in this case which requires consideration without elaborating the principle just stated, which is one of the elementary doctrines pertaining to tax titles. Without stating all of the facts, it is enough to say that the defendants, when they secured tax titles subsequent to acquiring the title under Adams and the quitclaims under Blood, were merely paying their own taxes.

It appears to us to be quite apparent from the above statement of facts pertaining to the acquisition of the tax sale certificates that they conferred no right on Clarke or Adams to tax deeds. Morgan had no

1. Tax title: validity against prior mortgage: redemption by grantee of mortgagor: delay in procuring deed.

authority to sell the certificates to Clarke for Adams or any other person. They were the property of Blood, and were not negotiable. A certificate of purchase at tax sale in the hands of an assignee is chargeable with all the infirmities that would affect it in the possession of the original holder. *Besore v. Dosh*, 43 Iowa, 211. The original holders of these tax certificates had sold them to Blood, and this operated as a redemption of the land from the tax sale. *Bowman v. Eckstein*, 46 Iowa, 583; *Burns v. Byrne*, 45 Iowa, 285; *Hunt v. Seymour*, 76 Iowa, 751. The certificates were of no more avail in the way of conferring a right on Clarke or Adams to a tax deed than if they had been blank paper.

And the tax deeds founded on said certificates were invalid, because they were not made for nearly eleven years after the sale. The sale was had on the fourth day of October, 1869, and the tax deeds were made on the fourth day of September, 1880. The three years allowed for redemption expired October 4, 1872, and the time within which tax deeds might issue expired five years thereafter, or in October, 1877. It was held in *Hintrager v. Hennessy*, 46 Iowa, 600, and that holding has been repeatedly followed by this court, that an action by the holder of a tax deed, to recover possession of the property sold for delinquent taxes, is barred after the expiration of five years from the time when he became entitled to a deed; in other words, a deed made more than five years after the period of redemption expired could not, under the statute then in force, be made the basis of the assertion of an affirmative right. The same statute was in force when the deeds under which the defendants in this action claim title were executed. Applying that rule to the facts in this case, we have the following state of case. The plaintiff is the owner of a mortgage upon the property, made by the owner of the patent title to the land. He has commenced an action to foreclose his mortgage, and there

is no defense to his suit, except that founded on tax deeds which conveyed no title because the land had been redeemed from the sales, and the claim of the defendants was barred because the deeds were not made within five years from the time they should have been made.

It is claimed that, under section 897, subdivision 3, of the Code, the plaintiff can not question the validity of the tax deeds, because he does not show that he, or the person under whom he claims title, had title to the land at the time of the tax sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims. It is probably a sufficient answer to this position to say that it is the defendants who are asserting the right to defeat the foreclosure of the plaintiff's mortgage, and in making their defense they show that the tax deeds conferred no title on Adams, the grantee therein. It is shown beyond question that Blood was the owner when he made the mortgage. The mortgagee or his assignee asserts the right to foreclose. The defendants are grantees under Blood, and took the patent title with notice of this mortgage. The only ground upon which they base their defense is the tax deeds, which by their very dates show that they were made and delivered long after there was any right to tax deeds, and the evidence shows beyond question that the land was redeemed by Blood. Under these circumstances we know of no rule announced in any case in this court which would preclude the plaintiff from the foreclosure of his mortgage. We think the foregoing discussion disposes of all material questions in the case. There are positions taken by counsel in argument in addition to those considered which do not appear to us to demand separate consideration, and we need not notice them in detail.

II. Lastly, it is claimed that the decree for plaintiff is in too large an amount. The amount claimed in the

2. PRACTICE IN  
SUPREME COURT:  
QUESTIONS CON-  
SIDERED ON  
APPEAL.

petition is six hundred dollars, with interest from the commencement of the suit at the rate of ten per cent. per annum.

The court found that the amount due at the trial, more than two years after the suit was commenced, was six hundred and twenty-five dollars. It is claimed that part of the amount due on the mortgage was paid by the present owner of a tract of land which was embraced in the mortgage, and that the whole sum should be apportioned to all of the land. We do not discover that any question of this kind was made by pleading, nor in any other manner in the court below. This court will not examine into mere matters of computation, unless it is shown plainly that the matter has been presented specifically to the court below.

The decree of the district court is AFFIRMED.

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WILLIAM TATE, Appellee, v. H. M. CONGAR, Appellant.

**Judgment:** COLLECTION: TITLE TO PROCEEDS: EVIDENCE. The defendant, as guarantor of certain bonds, with interest coupons attached, having prosecuted an action thereon to judgment in the name of the plaintiff herein, and collected the same, claimed that three of said coupons were never assigned to the plaintiff, and that so much of said judgment as represented the amount of such coupons belonged to him. *Held*, that the defendant's claim was not an attack upon the judgment, which could only be made in a direct proceeding in the same tribunal where the judgment was rendered, and that in an action to recover the amount of such coupons the defendant was entitled to show that he was the owner thereof.

*Appeal from Delaware District Court.*—HON. JOHN J. NEY, Judge.

THURSDAY, OCTOBER 12, 1893.

THE plaintiff sold to the defendant certain real estate in Iowa, and received in payment two Nebraska district school bonds of five hundred dollars each, to

each of which was attached five interest coupons at twenty-five dollars each, numbered from five to ten. The defendant, in writing, guaranteed the payment of the bonds. The bonds were afterwards intrusted to the defendant, who caused suit to be brought thereon in the Nebraska courts in the name of the plaintiff, and in due time judgment was obtained thereon, and by the aid of auxiliary proceedings the judgment was enforced, and the defendant received the sum of two thousand, seven hundred and twenty-one dollars and sixty-three cents, of which amount he paid to or for the plaintiff one thousand, nine hundred and fifty-three dollars and twenty-three cents, and this action is to recover the balance so received by the defendant, viz: seven hundred and sixty-eight dollars and fifty cents. The defendant states in his answer that of the coupons attached to the bonds, six, three to each, belonged to him, and were never assigned to the plaintiff, and the amounts thereof were included in the judgment, and that the remainder of the amount sued for consists of expenses and fees paid by him in the collection of the bonds, and for which, by express agreement, when he received the bonds for collection, he was to be reimbursed. There was a jury trial, resulting in a verdict for the plaintiff, from which the defendant appeals.—*Reversed.*

*Yoran & Arnold*, for appellant.

*Bronson & Carr* and *Blair, Dunham & Norris*, for appellee.

GRANGER, J.—The ground of the plaintiff's right of recovery is, briefly stated, that he was the owner of the Nebraska judgment; that the plaintiff had collected the same, and neglected or refused to account for a part of it. Upon the face of the judgment it was the plaintiff's property, and, *prima facie*, he was entitled to

all of it. The burden of showing that the defendant could retain any part was upon him, and this he attempted to do by averments in his answer, that he owned a part of the indebtedness on which the judgment was based, and that by contract with the plaintiff or his agent he was authorized to retain a part as fees and expenses paid to obtain the judgment; and to the answer is attached the receipt for the bonds, signed by the defendant, stipulating the terms upon which the defendant was to advance attorney's fees and court costs. The plaintiff, in a reply, denies that he made or authorized the making of such a contract, and avers that the bonds were taken by the defendant for collection on an oral agreement to collect the same without expense to the plaintiff on the defendant's contract of guaranty. The reply contains no denial of the averments of ownership by the defendant of a part of the coupons attached to the bonds, nor was it necessary. The law makes such a denial. Code, section 2665; *Bank v. Perry*, 72 Iowa, 15. The pleadings, then, presented the issues, *first*, whether or not the defendant owned any part of the indebtedness that entered into the judgment, so that, when collected, he would own a part of the proceeds of the judgment; and, *second*, whether the expenses and fees paid by the defendant were paid under the written contract set out by the defendant, or under the oral contract alleged by the plaintiff.

The court refused to permit the defendant to prove that he was the owner of coupons six, seven and eight, being the ones alleged to be his, and instructed the jury that "the defendant Congar, having acted in behalf of the plaintiff in employing counsel, and in assisting in obtaining judgment in favor of the plaintiff on the bonds in Nebraska, is bound by that judgment, and in accounting for any money received by him on the judgment \* \* \* can not plead or prove that

all of the judgment did not belong to the plaintiff. The records of judicial tribunals are solemn proceedings that bind every one, and can not be gainsaid, except by a direct proceeding in the same tribunal to correct errors that may be contained therein."

The learned judge who presided at the trial evidently misapprehended the issues and facts to which he applied the rule announced. Neither the solemnity nor the integrity of the Nebraska judgment was involved. That judgment had been fully satisfied, and the question in this case is, who is entitled to the proceeds after payment? In that situation we do not see why parties having an interest in the proceeds of the judgment may not as properly assert it, as if the bonds, after being delivered to the defendant for collection, had been paid before judgment. We can see nothing in the nature or solemnity of the judgment that should deny to these parties their respective rights as they might be found to be under the issues presented. This is not a proceeding between the parties to the judgment, nor is it a proceeding in any way attacking or seeking a modification of the judgment so as to invoke the rule stated as to the particular form for such a purpose. Let us suppose that, instead of prosecuting the suit in Nebraska in the name of the plaintiff, the defendant had taken the judgment with himself as plaintiff, and collected the same. Would it be said, in a suit in this state by the plaintiff to recover the proceeds to which he was entitled, that he must go to the Nebraska court for a correction of the judgment there, before he could obtain his rights? As much so, we think, as would the defendant in this case be required to do so in order to obtain any part of the proceeds of the judgment to which he is entitled. The rights of the parties to the money now in the hands of the defendant depends, not on the integrity of the Nebraska judgment, but upon the contracts of the parties by

which the bonds were transferred and afterwards collected. The parties, by their pleadings, presented these pleadings without any objections to their sufficiency, and their rights should be determined thereby. The effect of the instruction was to strike from the trial an issue of fact upon which the defendant was entitled to a verdict, and consequently it was erroneous. These considerations dispose of the rulings on the evidence wherein the court was evidently guided by the same views as to the law.

The appellee has made a careful computation as to the amount due him on the bonds at the date of the judgment entry, without the coupons claimed by the appellant, and urges that it is apparent therefrom that the Nebraska judgment did not include such coupons, and hence that the error was without prejudice. Conceding that the computation shows that the judgment is for only about the sum that would have been due on the bonds with the two coupons that, without dispute, belonged to the appellee, and still, under the issues of this case, we can not say that the disputed coupons were not included. If they were, the defendant is entitled to their proceeds if he owned them. The deficiency may be from some other cause. It is to be kept in mind that this is not a suit on the guaranty, so that the defendant's liability is fixed thereby, but it is upon his contract to collect for the plaintiff; and under the averments of the petition he is liable for what he has collected for him, less a deduction, if any, because of the terms on which the collection was made.

There are some minor questions where errors are claimed, but they are so related to the points considered that further notice of them is unnecessary in view of a new trial, except, perhaps, that we should say, as to a controversy in argument about an estoppel being in the case, that we think the issues present no such question.

For the error suggested the judgment is **REVERSED**.

W. E. SNELLING, Administrator, Appellee, v. MARY M. KROGER *et al.*, Appellants; and MARY M. KROGER, Appellant, v. CITY BANK OF MARSHALLTOWN *et al.*, Appellees.

**Estates of Decedents; ALLOWANCE OF CLAIMS: PROCEEDINGS TO SET ASIDE: SECURITY FOR PAYMENT: ESTOPPEL.** Where upon application by an administrator to sell real estate for the payment of a claim against the estate, duly allowed and approved, the sole devisee and legatee of said estate filed an answer thereto alleging that the allowance of said claim was procured by collusion and fraud, and asking that she be allowed to defend, and offering to file a good and sufficient bond for the payment of all claims established against said estate by the court, and a continuance of the hearing on said application was granted said devisee upon her filing a bond as offered, and thereafter upon proper proceedings instituted to vacate the order allowing said claim on the grounds of fraud and collusion, and the invalidity thereof, it was determined by the court that said allowance should stand, and the petition to vacate was denied, *held*, that the devisee was estopped from denying her liability for the payment of said claim.

*Appeal from Marshall District Court.*—HON. S. M. WEAVER, Judge.

THURSDAY, OCTOBER 12, 1893.

THESE two actions involve the validity of a claim of the City Bank of Marshalltown against the estate of Mrs. M. P. Turner, deceased. The first case is an application to sell real estate to pay the claim, which claim was allowed as a claim against said estate by the approval of one Merrit Greene, then administrator, and by an order of the district court allowing the claim, and ordering it to be paid by the administrator. Mary M. Kroger, the defendant in the first action or application for an order, is the sole legatee and devisee under the will of Mrs. Turner. The second action was

brought by said Mary M. Kroger to set aside the order of the court allowing said claim, upon the ground that its allowance was procured by fraud and collusion. Issue was taken upon the averments of this petition, and the two actions were consolidated, and a trial had by the court, which resulted in an order or finding of the court that there was not sufficient evidence of the alleged fraud, and the prayer to set aside the allowance of the claim was denied; and it was further held that the claim was a valid claim against the estate, and an order was made that certain real estate be sold to pay the claim. Mary M. Kroger appeals.—*Affirmed.*

*Caswell & Meeker*, for appellant.

*H. E. J. Boardman* and *Brown & Miller*, for appellees.

ROTHROCK, J.—The record is quite voluminous, and involves many of the transactions of the City Bank of Marshalltown for a number of years, and the evidence touching the alleged fraudulent and collusive acts of the bank and its officers and attorneys and the acts and conduct of Merritt Greene, who was administrator of the estate when the claim was established as a valid claim against the estate, is all set out in detail in the abstract. We have carefully examined the case in all its details, and, as we adopt the conclusions reached by the learned judge who presided at the trial in the district court, we can not state the facts and conclusions better or more briefly than we find them in a statement made by the said judge. They are as follows:

“FACTS.

“*First.* That many years ago (July 1, 1873), H. E. J. Boardman, James L. Williams, John Turner and C. W. Stone entered into partnership for the transac-

tion of a banking business under the firm name and style of 'The City Bank of Marshalltown, Iowa,' each partner having an equal one fourth interest therein.

*"Second.* That the entire capital stock of said partnership was invested in certain real estate situated in the city of Marshalltown, Iowa, the title to which real estate was taken and held by said partners in their individual names, apparently as tenants in common, and not in the name of the City Bank.

*"Third.* That, after continuing the business some years, said H. E. J. Boardman sold and transferred his interest in the business to said James L. Williams, and at a subsequent date said C. W. Stone sold and transferred his interest therein to one J. E. Henriques, and the business was continued by said Williams, Turner and Henriques under the same firm name and style, to wit, 'The City Bank of Marshalltown.'

*"Fourth.* That said several transfers from Boardman to Williams and from Stone to Henriques were evidenced and effected by ordinary deeds conveying respective interests of the retiring partners in the real estate of the firm to their said successors.

*"Fifth.* That on the — day of July, 1883, said John Turner died.

*"Sixth.* That a short time prior to his death said John Turner, by a duly executed deed of conveyance, transferred and conveyed all of his interests in said partnership real estate to his wife, Matilda P. Turner.

*"Seventh.* That, after the death of said John Turner, his said wife and grantee (Matilda P. Turner), was received and treated by said Williams and Henriques as a partner in said bank, owning and controlling the interest therein formerly held and owned by her said husband.

*"Eighth.* That on the sixth day of October, 1885, said Matilda P. Turner made and entered into a written

agreement with one D. T. Denmead in words and figures as follows: 'This memorandum of agreement made and entered into this sixth day of October, A. D. 1885, by and between M. P. Turner, of the city of Marshalltown, county of Marshall, and state of Iowa, party of the first part, and D. T. Denmead, of the same place, party of the second part, witnesseth: That, for and in consideration of the premises and undertakings of said second party hereinafter recited and set forth, said party of the first part hereby undertakes, covenants, and agrees, for and in consideration of the sum of fourteen thousand dollars, to be paid as hereinafter provided, to sell, and by deed of warranty to convey, unto said second party, the following described real estate, the same being and situated in the town of Marshall, county of Marshall, and state of Iowa, to wit, the undivided one fourth of the west one ninth of lot numbered four (4) in block numbered fourteen (14), and the undivided fourth of the east forty feet of lot numbered one (1), and the undivided one fourth of the north forty feet of the east forty feet of lot numbered two (2) in block numbered fifteen (15) in the original town of Marshall; also to the right of way over and across the north twelve feet of the south twenty feet of lot number two (2) in block number fifteen (15) Marshall. Said first party hereby promises, undertakes, and agrees, in consideration of said sum of fourteen thousand dollars, to sell, assign, and transfer all her right, title, and interest in and to the assets, rights, credits, effects and good will of the City Bank, doing business in said premises on said lots numbers one (1) and two (2) on said block number fifteen (15); the interest intended to be hereby conveyed being the undivided one fourth of said banking business. And said second party, for and in consideration of said undertakings and agreements of said party of the first part hereinbefore recited and set forth, hereby under-

takes, promises, and agrees, on the first day of January, A. D. 1886, to pay, or cause to be paid, to said first party, the sum of fourteen thousand dollars (\$14,000.)

*"Ninth.* That, in pursuance of said written contract, Mrs. Turner did, on or about January 1, 1886, make and deliver to said Denmead a deed with the ordinary covenants of warranty, conveying to him an undivided one fourth of said partnership real estate.

*"Tenth.* That, for many years prior to sale of Mrs. Turner's interest to Denmead, if not from the inception of the business in 1873, it had been the practice of the firm to carry along upon its books substantially all the bills receivable and other debts owing the bank as assets, without charging off, or carrying to profit and loss account, the bad and worthless paper which accumulated to a considerable extent in the progress of the business, and that, at semi-yearly periods, dividends were declared and paid to the several partners on the basis of said apparent resources.

*"Eleventh.* That soon after the transfer of Mrs. Turner's interest to Denmead the new firm opened an account with Denmead, Williams & Co., by which name it claims to have designated or intended the old firm as constituted immediately prior to Denmead's purchase, to which account was charged the notes and bills hitherto carried as assets, but now appearing to be worthless, together with items of interest accumulated on certain certificates of deposit outstanding at the time of Mrs. Turner's retirement from the business. There were also charged to this account an item of two thousand and forty-five dollars and fifty-five cents, as for 'difference between notes on hand and as shown by the books, shortage' together with certain other matters of minor importance.

*"Twelfth.* That on the third of February, 1886, this account was credited with the undivided profits of the business as shown by the books at the date of the

transfer of Mrs. Turner's interest to Denmead, and, there still appearing due from Turner, Williams & Co. a further sum of three thousand, four hundred and eighty-four dollars and sixty-four cents, the same was balanced by the following entries upon the credit side of said account: By one half shortage to date, contributed by J. L. Williams, one thousand seven hundred and forty-two dollars and thirty-two cents; by one fourth shortage to date, contributed by M. P. Turner, eight hundred and seventy-one dollars and sixteen cents; by one forth shortage to date, contributed by J. E. Henriques, eight hundred and seventy-one dollars and sixteen cents.

*"Thirteenth.* That said sum of eight hundred and seventy-one dollars and sixteen cents, credited to said account as a payment or contribution by Mrs. Turner, was not paid by her personally, but at the date of said item said City Bank was indebted to her upon deposit account to the amount of several thousand dollars. Said J. L. Williams, by medium of what he calls a 'memorandum check' made by himself, caused her said deposit account to be charged with said sum, and the account of Turner, Williams & Co. to be credited therewith as aforesaid. It does not clearly appear from the evidence whether at the date of this transaction any demand had ever been made upon Mrs. Turner to contribute to this alleged shortage, or whether she had any actual notice of the existence of the Turner, Williams & Co. account. It seems, however, that she was displeased or dissatisfied with said transaction, and soon thereafter withdrew her deposit from said bank, and thereafter, till her death, there was little or no further communication between them on business matters.

*"Fourteenth.* That thereafter, from time to time, said City Bank charged other items of uncollectible bills and notes, and other items of interest, to Turner,

Williams & Co., but no part of the same was ever paid by Mrs. Turner.

*"Fifteenth.* That on the thirteenth day of March, 1889, said Matilda P. Turner died, making, by her will, the defendant, Mary M. Kroger, her executrix and sole legatee and devisee.

*"Sixteenth.* That the will of said Matilda P. Turner was duly admitted to probate, and the said Mary M. Kroger duly qualified as executrix thereof.

*"Seventeenth.* That on the fifth day of September, 1889, said James L. Williams filed, or caused to be filed, against said estate, a claim in the name of 'The City Bank of Marshalltown, Iowa.'

*"Eighteenth.* That soon after filing said claim the City Bank made written application to the court, alleging that said executrix had removed from the state, so that service of notice of said claim could not be made upon her, and asking that she be removed from said trust, and another be appointed administrator with the will annexed.

*"Nineteenth.* That said executrix appeared by Henderson & Margrave, her attorneys, and resisted said application, and on the tenth day of October, 1889, by said attorneys, accepted service of notice of said claim by indorsing thereon in writing the words following: 'Due, full, and legal service of notice of the within claim accepted this tenth day of October, A. D. 1889. Mary M. Kroger, Executrix of Estate of Matilda P. Turner, deceased. By Henderson & Margrave, her attorneys.'

*"Twentieth.* That soon after the acceptance of service of notice, as aforesaid, an order was entered by the court, by the consent of the parties, removing said executrix from said court, and appointing one Merrit Greene administrator with the will annexed, of the estate of said Matilda P. Turner.

*"Twenty-first.* That upon the sixteenth day of October, 1889, said Merrit Greene indorsed in writing, upon the claim filed by the City Bank as aforesaid, his approval thereof in words following, to wit: 'Approved and allowed two thousand, two hundred and eighty-two dollars and fifty-six cents this sixteenth day of October, A. D. 1889. Merrit Greene, Administrator, with the will annexed.'

*"Twenty-second.* That thereafter, upon the same day, said claim was presented to the clerk of said court for his approval, and was by him indorsed in writing as follows: 'Allowed by the court this sixteenth day of October, A. D. 1889. James Commack, Clerk.'

*"Twenty-third.* That on or about the twentieth day of November, A. D. 1889, the same being the last day of the October, 1889, term of this court, said claim was presented to this court for approval and allowance. Counsel for the defendant were not present in court, and, there being no resistance to the claim, the approval thereof by the administrator and clerk was formally confirmed.

*"Twenty-Fourth.* That on the third day of December, A. D. 1889, said administrator filed his petition in this court, showing the absence of personal assets in his hands belonging to said estate, and asking an order to sell certain real estate, of which Mrs. Turner died seized, for the purpose of paying said claim. Said Mary Kroger was a party defendant to said proceeding, and appeared thereto by her said attorneys.

*"Twenty-fifth.* That on the sixteenth day of January, 1890, said defendant filed her answer to said petition for order to sell real estate, averring, in substance, that the allowance of said claim was procured by collusion and fraud, and without notice or knowledge thereof to her or her attorneys, and that the claim was wholly unjust, and without color or foundation or

right, and asked that said allowance be set aside, and she be permitted to defend.

*"Twenty-sixth.* That in said answer said Mary M. Kroger averred her ability and willingness to pay all just claims against the estate 'whenever the same are presented and shown to be just, and are properly allowed by the court;' also that she is 'able, ready, and willing to furnish a good and sufficient bond in any reasonable sum that the court may require, and now here offers to do so under direction of the court with suitable conditions as the court may direct, for the payment, within such reasonable time as the court shall direct, of every dollar of claims which may be allowed and established by the court, without needless expense and sacrifice of the real estate.'

*"Twenty-seventh.* That at or about the time of filing said answer said Mary M. Kroger also filed, in the probate proceedings, a petition of intervention setting up substantially the same matters pleaded in said answer, and asked to have the allowance of said claim set aside, and that she be permitted to resist the same.

*"Twenty-eighth.* That on the fourteenth day of April, 1890, said administrator filed his answer to said petition of intervention, denying all allegations of fraud and collusion.

*"Twenty-ninth.* That on the twenty-third day of April, 1890, said Mary M. Kroger, by her attorneys, filed a motion for continuance of said cause over the term of court then in session, and in said motion averred 'that no harm could come to the claimant by granting the time asked, as the delay would be compensated by accruing interest, and defendants have in their answer offered, and within any reasonable time and sum, which the court may determine, can and will secure the same by bond.'

*“Thirtieth.* That said motion was sustained, and the cause ordered continued on certain conditions, the said order and conditions being made in words following, to wit: ‘Motion for continuance granted at costs of Mary M. Kroger, and on the following terms, to wit: She is within thirty days from this date to file herein a good and sufficient bond in the penal sum of three thousand dollars, for the use of the city bank, and costs as shall hereafter be finally determined in this adjudication. If said bond be not filed herein in manner and time as above stated, city bank claim shall be regarded as established, and shall be confirmed at the next term of this court.’

*“Thirty-first.* That thereupon said Mary M. Kroger did file her bond with the clerk, which was executed in compliance with the order, and it was approved, and the cause continued.

*“Thirty-second.* That on the seventh day of May, 1890, said Merrit Greene having removed from the state and surrendered his said trust, W. E. Snelling was duly appointed and commissioned administrator with the will annexed, in his stead.

*“Thirty-third.* That on the twenty-ninth day of July, 1890, said Mary M. Kroger, by her said attorneys, filed in this court her petition in equity against the city bank of Marshalltown and said W. E. Snelling, administrator, as defendants, stating in extended form the history of said claim, and alleging that its allowance had been procured by fraud and collusion, and asking that said allowance be set aside and held for naught, and that the proceedings to sell her real estate to satisfy such claim be perpetually enjoined.

*“Thirty-fourth.* That at the September, 1890, term of court the defendant named in said petition in equity took issue thereon, and the said cause was consolidated for trial with the issue already joined upon the administrator’s petition for order to sell real estate.

*“Thirty-fifth.* That the ‘petition in equity,’ hereinbefore referred to, was treated by both parties as in the nature of an application for new trial, under the provisions of chapter 1, tit. 19, of the Code of 1873, and upon that theory proceeded to a trial and hearing before the court, as provided in sections 3158 and 3160 of said Code, to determine, *first*, whether there were sufficient grounds to vacate the order of allowance, and, *second*, whether the petitioner would make a sufficient showing of a valid defense in the event the alleged fraud in procuring the allowance was found to be established by the evidence.

*“Thirty-sixth.* That upon said hearing the court decided that there was not sufficient evidence of the alleged fraud, and accordingly refused to set aside the allowance; but as a part of said ruling and decisions the court said: “I do not attempt, in this proceeding to determine whether Mrs. Kroger has or has not a right, notwithstanding the allowance of the claim, and notwithstanding this refusal of a new trial therein, to urge any or all defenses to the proceeding to sell her land which her mother, if living, or the administrator might have set up, which language and statement of the court was entered of record with said decision, and made a part thereof.

“Upon the issues joined as aforesaid, and upon consideration of the facts found, as aforesaid, I reach the following conclusions of law:

“That the claim filed by said City Bank having been allowed by the administrator and by the clerk, and such allowance having been approved and confirmed by the court, and the petition to vacate such order of allowance having been denied, the same stands as a valid and subsisting claim against said administrator, and payment thereof can be enforced against him to the extent, at least, of the personal estate of the decedent coming into his hands.

"*Second.* That, having voluntarily given her bond to pay, satisfy and discharge any claim of the City Bank against the estate of M. P. Turner which may be confirmed or allowed by the court, the said Mary M. Kroger is now estopped to deny her liability to pay said claim, or the liability of her property to be subjected thereto, and it becomes unnecessary to consider or pass upon the question whether the allowance of a claim by the court, as against the administrator, is or is not conclusive upon the heir in a proceeding to subject his real estate to the payment of such claim."

We can discover no reason for further discussing the questions presented upon the appeal. When it was found, as we think correctly, that there was not sufficient evidence to authorize an order setting aside the allowance of the claim as being procured by fraud and collusion, it appears to us that it was an end to all further controversy between the parties. The bond given by Mary M. Kroger was not demanded of her. So far as appears, the other parties were content to resort to the sale of the real estate. It was given in pursuance of her voluntary offer. Having executed and filed this bond, she was not in a position to resist the claim after it was found that its allowance was not procured by fraud. It is not necessary to further elaborate the case. **AFFIRMED.**

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L. H. HUMBERT, Appellant, v. T. J. LARSON *et al.*,  
Appellees.

1. **Sale: IMPLIED WARRANTY: PLEADING.** In an action upon a promissory note given for the purchase price of a stallion, the defendant pleaded a failure of consideration based upon the fact that the horse was represented to be a sure foal getter and healthy, when in fact he was not. In another division of the answer the defendant alleged that the sale of said stallion was accomplished by fraud, and in yet another division averred special damage because of said fraudulent representations. The bill of sale transferring said stallion, and

89	258
89	258
105	160
89	258
129	81

which was attached to the defendant's answer, provided that if said horse proved barren, the vendors would, at their option, refund the money paid therefor, or furnish another horse in his place. *Held*, that the question of implied warranty was not presented by the pleadings.

2. **Special Verdict: INTERROGATORIES SUBMITTED AFTER ARGUMENT COMMENCED: NEW TRIAL.** The submission to the jury of interrogatories propounded by one of the parties to a cause for a special verdict, which were not submitted to the attorneys of the adverse party until five or ten minutes after the opening argument to the jury had been commenced, *held*, to be sufficient ground for a new trial.

*Appeal from Adams District Court.*—HON. W. H. TEDFORD, Judge.

THURSDAY, OCTOBER 12, 1893.

ACTION on a promissory note. Defense of a failure of consideration, and fraud, and a counterclaim. Judgment for the defendants, and the plaintiff appeals.—*Reversed*.

*Dale & Brown and W. O. Mitchell*, for appellant.

*Davis & Wells*, for appellees.

GRANGER, J.—I. The defendant T. J. Larson and thirteen others constitute an association known as the 1. **SALE: implied warranty: pleading.** Norway Draft Horse Company, and all the members, except N. P. Nelson, deceased are defendants, in this suit. In January, 1889, the association bought of the plaintiff a Norman stallion, called "Zephirin," for the agreed price of one thousand, five hundred dollars, and gave therefor three promissory notes for five hundred dollars, maturing, respectively, June 1, 1890, 1891 and 1892. This action is upon the first of the series of notes. There was a bill of sale of the horse in which the plaintiff is designated as party of the first part, and the Norway Draft Horse Company that of the second part, and the following are a part of the conditions:

"The parties of the first part assume no responsibility on account of disease or accident to said horse after leaving their stable, but agree that if, with proper treatment and handling, said horse proves barren, they will, at their option, refund the money paid for said horse, or furnish another horse in his place; provided said horse is returned as sound and in as good condition as when sold by said first parties. Said horse shall not be considered as fully tested until he shall have been kept by said second party two years from the beginning of the first season he makes after this date. This guaranty shall be binding on the party of the first part only on the express condition that the party of the second part strictly complies with all his covenants hereinafter made; and time is hereby expressly made the essence of this contract."

The answer, in the first division, admits the execution of the note and a liability thereon, "unless the defenses herein set forth shall prevail." In the second division is pleaded a failure of consideration for the note, based upon allegations that the horse was sold by the plaintiff and purchased by the defendants for breeding purposes, upon representations that he was a sure foal getter, healthy, and a first-class horse for breeding purposes; that in fact the horse was not sound, nor a sure foal getter, nor healthy, and was of no value for breeding purposes, nor of any value whatever, and that the horse, after the first season, sickened and died. The third division is a statement of facts showing fraud in the sale of the horse, and that the notes and bill of sale were obtained by fraud; and the other division is devoted to averments of special damage because of the fraudulent representations. A reply denies "each and every allegation of affirmative defense in each division of said answer and amendments contained, and expressly denies all fraud and misrepresentation." It will be seen that the issues of the case arise upon the answer and reply.

We have been thus full in our reference to the issues to indicate the relation to the case of the conditions quoted from the bill of sale, as much space is devoted in argument to the rights of the parties under an implied warranty and the effect of such conditions. We do not understand that the case involves any question as to a warranty. The defendant in no way pleaded a warranty, but only, as we have stated, a failure of consideration, and fraud. As to the plea of fraud, it is somewhat doubtful whether it was designed as defensive matter, and also by way of counterclaim, or only the latter. The defendants attach the bill of sale as an exhibit to the answer, but not as a basis for a right of recovery under its terms, but only as an instrument executed with the notes, and obtained by fraudulent representations, for the purpose of avoiding, rather than enforcing, its terms; that is, they seek to avoid the conditions of the bill of sale as well as the notes, because obtained by fraud. The reply puts in issue the facts pleaded. From the tenor of the instructions we are led to think the district court experienced a difficulty in its presentation of the issues, for in its statement of the "second defense" the conclusion is that, because of the facts pleaded, there has been damage in the sum of four hundred dollars because of "expense of keeping and advertising," and "that plaintiff has no right to recover on said note because of said fraud," etc., showing that the cause was submitted on the theory of the division of the answer containing both matter of counterclaim and defense. Added to this is a claim by the appellant that the failure of consideration "is pleaded in the second and third divisions of defendant's answer," and an argument is based on that theory. We think the plea of a failure of consideration is limited to the second division.

The appellant urges, in view of the fact that other notes are likely to be affected by the conclusion in this

case, that it is of the highest importance to all the parties to this suit that the issue or issues on which the verdict is sustained, if sustained at all, should be precisely stated. As the cause must be reversed, and stand for a new trial, we think the same considerations apply in view of this case, and that the issues should be precisely stated in the district court, and, if not done otherwise, it should be on the court's own motion. With the issues thus presented, we think many of the complaints now urged to the instructions might be avoided. It may be well to here state that some of the questions urged as to instructions and evidence should have been presented by way of objections to the pleadings, and there settled, for, if valid, they were apparent on the face of the pleadings, and involved the merits of the case.

II. The burden of the case was such that defendants' counsel had the opening and closing to the jury.

2. SPECIAL verdict: interrogatories submitted after argument commenced: new trial.

After the first argument had proceeded some five or ten minutes, the defendants' counsel presented to the court certain questions to be presented to the jury.

The plaintiff objected, for the reason, among others, that they were not presented to the attorneys for the adverse party before the argument commenced. As there is a controversy as to the facts under which the questions were submitted, the following is quoted from the record: "The court: It is ordered, and made a part of the record in this case, that the special interrogatories submitted to the jury therein were not submitted to the counsel for the plaintiff until after the defendants had commenced their opening argument, and after the first counsel for defendants had spoken from five to ten minutes; that then the special interrogatories were presented to the counsel for the plaintiff, and they had the use of the same during their arguments to the jury, and that the

same were allowed to go to the jury by the court, against the exceptions of the plaintiff." After the questions were presented there was talk between counsel and the court, in which the court attempted to have the objections withdrawn, or to have counsel agree to the submission. There was also talk of their being submitted on the court's own motion, and the appellees, in argument, claim that they were finally so submitted, but the record does not support the claim.

It was error to submit the questions. The statute is specific, and is as follows: "In all actions, the jury, in their discretion, may render a general or special verdict; and in any case in which they render a general verdict, they may be required by the court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact to be stated to them in writing, which questions of fact shall be submitted to the attorneys of the adverse party before the argument to the jury is commenced." Code, section 2808. In *Hopper v. Moore*, 42 Iowa, 563, the questions were presented just before the closing argument, and refused, and the ruling was sustained. In *Crosby v. Hungerford*, 59 Iowa, 712, it is said: "The statute is imperative that such questions must be submitted to the attorneys of the adverse party before the argument is commenced." It is there said that a submission to the court before argument is not sufficient. The appellees cite *Petrie v. Boyle*, 56 Iowa, 163, in which the court, on its own motion, submitted interrogatories without submission to attorneys, and this court, not deciding the right of the court so to do, held that under the state of the record there was no prejudice. The case, however, guards the question we are considering in these words: "It is clear when interrogatories are propounded at the instance of one party, they must be submitted to the adverse party, before the argument is commenced." These authorities seem

conclusive of the question, and very manifestly reflect the legislative intent to fix a definite time in which the opposite counsel should have the questions. It is now settled that the court may on its own motion submit questions, without submission to attorneys, by which method any emergency for such questions might be met. See *Clark v. Ralls*, 71 Iowa, 189; *Briggs v. McEwen*, 77 Iowa, 303, 305.

Because of the condition of the record, we omit the consideration of some questions, thinking that with the issues properly defined they will not arise on another trial. For the error in submitting the interrogatories the judgment is REVERSED.

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JANE FUNK *et al.*, Appellees, v. MERCANTILE TRUST COMPANY, Intervenor, Appellant.

1. **Appeal: ACCEPTING BENEFITS OF JUDGMENT: WAIVER.** The right of appeal from a part of a judgment will not be waived by accepting the benefits of another part thereof not in any manner involved in the appeal.
2. **Mortgage on Income and Profits of Mine: GARNISHMENT: PRIORITY OF LIENS.** A mortgage upon the "income, issues and profits" of a coal mine includes accounts due the mine owner for coal sold from such mine, and is valid as against a garnishment of such accounts by a judgment creditor of the proprietor of the mine.
3. —: **FORECLOSURE: MERGER.** The priority of the lien of such mortgage would not be lost as to such accounts by the foreclosure of the mortgage, where the decree is made as broad as the mortgage, and authorized the mortgagee to subject to the payment thereof the income and issues of the business of the mortgagor.

*Appeal from Keokuk District Court.*—HON. J. K. JOHNSON, Judge.

THURSDAY, OCTOBER 12, 1893.

GARNISHMENT proceedings on execution for the payment of a judgment in favor of the plaintiffs, and

against the defendant, the Crescent Coal Company. The Chicago & Northwestern Railway Company and the Burlington, Cedar Rapids & Northern Railway Company were garnished as debtors of the defendant. Thereupon the Mercantile Trust Company of New York intervened, claiming the right to have appropriated, for the payment of a judgment it held against the coal company, money which the garnishees admit that they were owing to the defendant. There was a trial by the court, and a judgment in favor of the plaintiffs, and against the Chicago & Northwestern Railway Company, for the amount due on the judgment of the plaintiffs, and for costs, and, to the extent of the money so appropriated, the petition of intervention of the trust company was dismissed. It was further adjudged that the Chicago & Northwestern Railway Company pay the remainder of the amount it was owing to the defendant, and that the Burlington, Cedar Rapids & Northern Railway Company pay the remainder of the amount it was owing to the defendant, to the clerk, to be applied on the judgment of the intervenor. From so much of the judgment as required the payment by the Chicago & Northwestern Railway Company of the amount due on the judgment of the plaintiff, the intervenor appeals.—*Reversed.*

*C. M. Brown*, for appellant.

*G. D. Woodin* and *J. C. Beem*, for appellees.

ROBINSON, C. J.—I. The appellees ask that the appeal be dismissed on the ground that the appellant has accepted the money which the garnishees were required to pay into court for its benefit, and for that reason has no further right to prosecute the appeal. After the judgment against the garnishees was rendered, the Chicago & Northwestern Railway Company paid to the clerk,

1. APPEAL: accepting benefits of judgment: waiver.

to be applied on the judgment in favor of the intervenor, the sum of six hundred and eighteen dollars and fifty-six cents, and the Burlington, Cedar Rapids & Northern Railway Company paid to the clerk, for the same purpose, the sum of one thousand, three hundred and forty dollars and fifteen cents. Both these sums were paid to, and accepted by, the intervenor after the appeal was taken. The Chicago & Northwestern Railway Company also paid to the clerk, to be applied on the judgment of the plaintiffs, the sum of one thousand, one hundred and thirty-nine dollars and thirty-six cents. The appellees did not except to the judgment in the garnishment proceedings, and have not appealed from it, nor any part of it. So far as the record shows, the judgment rendered was entirely satisfactory to them. There is no controversy excepting as to so much of the judgment as required the payment of money to apply on the judgment of the plaintiffs. By agreement of the parties, that money was to be deposited in bank at the best obtainable rate of interest, to await the result of this appeal. It thus appears that there is no controversy in regard to the right of the appellant to the money it has received, and we are of the opinion that the right to prosecute the appeal was not waived by accepting it. See *Anglo-American Land, Mortg. & Agency Co. v. Bush*, 84 Iowa, 272, and cases therein cited; *Byram v. Polk County*, 76 Iowa, 75, 78. The application to dismiss is overruled.

II. In the year 1889 the Crescent Coal Company executed to the intervenor a mortgage to secure the payment of one hundred thousand dollars in bonds. The property so mortgaged included lands in Keokuk county, the coal in the land, together with the right to mine and remove it, the towers, hoisting and pumping machinery and other appurtenances of the mines in the mortgaged premises, and personal property used in

2. MORTGAGE ON  
income and  
profits of mine:  
garnishment:  
priority of  
liens.

connection with the mines. The mortgage also included all right and title of the coal company "to all money and credits due, or to become due to it, and all the contracts and agreements made or to be made, and all and singular any property that may be acquired in the future by the party of the first part, and all and singular the entire property of the party of the first part, both real and personal, wherever found, together with the rights, privileges and appurtenances belonging or in any wise appertaining to the said land and coal, \* \* \* together with all its corporate rights, privileges, immunities and franchises now held or hereafter to be acquired, with the reversion and reversions, remainder and remainders, income and royalties, rents, issues, and profits thereof, and all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, present or in future, of the party of the first part of, in, and to, all and singular the property and effects hereinbefore described, and every part of the same, and every parcel thereof, with the appurtenances, and all revenues, benefits and advantages and profits to the party of the first part at any time accruing from or out of the same, or the business operations thereof, to have and to hold the same," etc. The mortgage also provided for the taking possession of the mortgaged property. On the twenty-fifth day of March, 1891, the intervenor obtained in the district court of Keokuk county a decree for one hundred and seven thousand and fourteen dollars and thirty-seven cents, due on the bonds, foreclosing the mortgage, and ordering the sale of the mortgaged property. The decree followed the mortgage in all respects, and gave to the intervenor the right to the possession of all the mortgaged property until the amount adjudged to be due should be paid, or until the right of possession should pass to a purchaser. On the twentieth day of April, 1891, an execution was issued, under which so

much of the mortgaged property as could be found was sold. The execution was returned August 1, 1891, satisfied only in part, more than sixty thousand dollars remaining unpaid. On the fifteenth day of April, 1891, a judgment was rendered by the district court of Keokuk county in favor of the plaintiff, and against the coal company, for the sum of one thousand and thirty-three dollars and thirty-seven cents and costs. On the eighteenth day of the same month an execution was issued on the judgment so obtained, under which the Chicago & Northwestern Railway Company and the Burlington, Cedar Rapids & Northern Railway Company were garnished, and the plaintiffs claim that by means of that garnishment they became entitled to the payment of their judgment from the money owed by the garnishees to the defendant. It appears that the money so owed was due for coal which the coal company had mined from the mortgaged land, and furnished to the garnishees, between the thirty-first day of March and the nineteenth day of April, 1891. The intervenor contends that the money owed by the garnishees was income, issues and profits accruing from and out of the mortgaged property, and from the business operations of the company, and was included in the mortgage, and that the plaintiffs, their attorneys, and the sheriff had actual notice of the mortgage on the money in the hands of the garnishees before they were garnished. The plaintiffs admit that they and their attorneys and the sheriff knew the contents of the mortgage, but deny that they had actual notice of the mortgage on the debts in question at the time of the garnishment.

It is claimed by the appellees that the mortgage did not include such debts, for the reason that the description is not sufficiently specific and definite. In *Sandwich Manufacturing Co. v. Robinson*, 83 Iowa, 567, 568, it was held that a valid mortgage on a claim

for money not earned, as on accounts for work to be done, may be given. We know of no reason why such a mortgage may not also be given upon the income, issues and profits of the business of mining and selling coal, and upon accounts which may accrue from it. It may be true that the description in the mortgage in question is too indefinite and uncertain, as to some of the property and property rights sought to be included, to be effectual; but, if that be so, it would not affect the right of intervenor to any property sufficiently described. The debts which the garnishee owed the defendant were for coal on which intervenor had a mortgage, and were income and issues of the defendant which accrued from its business operations. The plaintiffs knew the contents of the mortgage, and must be charged with knowledge of the fact which the relation of the garnishees with the defendant necessarily suggested, and which an inquiry would have disclosed with certainty, that the debts garnished grew out of the business of the defendant, and were included in the mortgage. We conclude that the mortgage was valid as against the plaintiffs.

III. The appellees contend that the intervenor had no claim to the money in question, for the reason that the mortgage was merged in the decree.

3. —: foreclos-  
ure: merger. It may be conceded that, after the decree was rendered, no action could have been maintained on the mortgage as between the parties to the decree. But the effect of the decree was to set aside, and in a manner appropriate, the mortgaged property to the payment of the debt which was ascertained and fixed by the decree. That did not release any of the mortgaged property but authorized the intervenor to enforce its claim against it, including income and issues of the business of the defendant, and the demands for money which grew out of it. The money owing to the defendant by the garnishees was for coal which had been

mortgaged to the intervenor, and which had been appropriated by the decree for the payment of the mortgage debt. The coal was sold after the decree of foreclosure was rendered, but before execution to enforce it was issued. That the intervenor had an equitable claim upon the money due for the coal, which was superior to the right acquired by the plaintiffs through their garnishment, is clear.

By agreement of parties this cause was tried as in equity, and the district court had ample power to enforce, by a suitable decree, the equitable right of the intervenor to the money in question. A decree requiring the money which was paid into the district court for the benefit of the plaintiffs to be applied on the judgment of the intervenor against the defendant will be entered in this court. The decree of the district court, so far as it is involved in this appeal, is REVERSED.

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WILLIAM HINTRAGER, Appellee, v. E. H. SMITH, Appellant.

**Action for Possession of Real Estate: STATUTE OF LIMITATIONS: FORMER ADJUDICATION.** A decree quieting the title to land in the plaintiff, in an action brought to obtain such relief, and forever barring and estopping the defendant therein from thereafter claiming title thereto, but containing no provision as to the possession of the property, will estop such defendant from setting up the statute of limitations against said plaintiff in an action subsequently commenced by the latter for the possession of said property.

*Appeal from Dubuque District Court.*—HON. J. J. NEY, Judge.

THURSDAY, OCTOBER 12, 1893.

THIS is an action to recover possession of certain real property, and damages for rents, and for wood cut and removed from the premises. The defendant pleaded the statute of limitations, which plea

the court withdrew from the consideration of the jury, and ordered a verdict for the plaintiff, upon which judgment was entered. The defendant appeals.—*Affirmed.*

*Henderson, Hurd, Daniels & Kiesel*, for appellant.

*Powers, Lacy & Brown*, for appellee.

GIVEN, J.—I. The defendant was in actual, continuous, visible, and exclusive possession of the land from 1878 to the time this case was tried, January 19, 1892. This action was not commenced until December 24, 1890, more than ten years after the defendant's possession began, wherefore the defendant claims that this action is barred by section 2529 of the Code, which provides, that actions for the recovery of real property may be brought within ten years after the cause accrues, and not afterwards.

On March 13, 1879, the plaintiff commenced an action against the defendant to quiet the title to this land in the plaintiff. In that action a decree was entered October 19, 1888, decreeing that the plaintiff was the owner in fee simple of the land, establishing the title in him, and forever barring and estopping the defendant from claiming title thereto. In that case there was no prayer or decree for possession. While it is not disputed that, in the absence of this decree, the plaintiff's action was barred, his contention is that, by reason of the decree, it is not. By the decree, all existing questions of title, whether arising out of adverse possession or otherwise, were conclusively settled between the parties. All claim of right and color of title were taken from the defendant, and he was barred and estopped from afterwards claiming title to the land. His future possession was not under claim of right or color of title, and was not, therefore, subject to the statute of limitations. *Larum v. Wilmer*, 35

Iowa, 244, and *Knudson v. Litchfield*, 87 Iowa, 111, fully answer this contention.

The defendant cites, and relies upon, *Garrett v. Bicklin*, 78 Iowa, 115. There Garrett's property was attached as the property of one Kendall in a suit of Bicklin, Winzer & Co. against Kendall. Garrett intervened in the attachment suit, claiming to be the owner of the property, and such proceedings were had that the property was adjudged to be the property of Garrett. Meantime, the property was sold on special execution to Bicklin, Winzer & Co., and, after the judgment that Garrett was the owner, he brought suit against Bicklin, Winzer & Co. for damages for conversion. Bicklin, Winzer & Co. pleaded the statute of limitations, as if it had been running during the pendency of the proceedings to determine the ownership, and this court sustained the plea. This court held that Garrett had his choice of two remedies, namely, to proceed to secure the property, as he did, by his intervention, or to recover its value; and that, having made his election, the statute continued to run as to the other. The distinction between that case and this is obvious. In that the personal property of Garrett, taken on the attachment, was the single subject of the action. Garrett had the choice to sue for his property or for its value. The recovery of either would make him whole. Therefore, he might not claim both, but must choose which he would ask. In this case the plaintiff had two causes of action, one to quiet title to the land, and the other to recover possession and for its use. A recovery of either did not make him whole as to the other.

II. The defendant calls attention to the fact that the plaintiff sets out certain tax titles in his chain of title, and contends that the five years' limitation applies to these titles. There is no question of title involved in this case. As already stated, the decree settled all

questions of title between these parties. We conclude that there was no error in the action of the district court, and the judgment is therefore AFFIRMED.

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SHENANDOAH NATIONAL BANK, Appellee, v. MARTHA MARSH, Appellant.

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98	196

**Promissory Note: PROVISION FOR ATTORNEY FEES: NEGOTIABILITY.**

The negotiability of a promissory note is not affected by an agreement therein to pay "ten per cent. attorney's fees, if placed in attorney's hands for collection."

*Appeal from Lucas District Court.*—HON. E. L. BURTON, Judge.

THURSDAY, OCTOBER 12, 1893.

ACTION on a promissory note. There was a verdict and judgment for the plaintiff, and the defendant appeals.—*Affirmed.*

*Stuart & Bartholomew*, for appellant.

*Mitchell & Penick*, for appellee.

KINNE, J.—The plaintiff's action is brought upon a promissory note, which reads:

"CHARITON, IOWA, July 16, 1890.

"On January 16, 1891, for value received, we jointly and severally promise to pay A. H. Warren, or order, one hundred and fifty-one dollars, payable at the First National Bank of Chariton, Iowa, with interest at the rate of eight per cent. per annum from date until paid, and ten per cent. attorney's fees, if placed in attorney's hands for collection. The interest on this note is payable annually, and this entire note to be due when there is interest due and unpaid. All delinquent interest to draw ten per cent. interest from the time delin-

quent. Jurisdiction is conferred upon any justice of the peace. The makers and indorsers hereof waive demand and protest. MARTHA MARSH."

The defendant pleads fraud practiced in procuring the note, and that the same is without consideration. The plaintiff, in a reply, denies the allegations in the answer, and avers that it purchased said note in good faith, before maturity, for a valuable consideration, and without notice or knowledge of any defect in the note or defense thereto. After the evidence was all in, the court sustained the plaintiff's motion to discharge the jury, and enter judgment for the plaintiff for one hundred and forty-three dollars and forty-five cents, the sum the plaintiff had paid for the note, "upon the ground, alone, that said note was negotiable, and the evidence without conflict showed that the plaintiff was an innocent purchaser thereof before maturity, and hence the defense of fraud or want of consideration in the execution of the note could not be asserted or maintained by the defendant as against the plaintiff."

The record shows that it was conceded by the parties that the evidence tended to show that the note was procured from the defendant by means of fraud on part of Warren, the payee therein, and that it was without consideration. It appeared from the evidence, without conflict, that the note was purchased by the plaintiff from Warren, in the regular course of business, prior to its maturity, without notice or knowledge that it had been procured through fraud or was without consideration, or that there was any other defense thereto; that the purchase was made in good faith, and that the plaintiff paid Warren one hundred and forty-three dollars and forty-five cents for it.

Several errors are assigned, but the only point pressed in argument is that the note was non-negotiable, and hence open to the defense pleaded. The note con-

tains the following provision: "And ten per cent. attorney's fees, if placed in attorney's hands for collection." It is contended that this provision renders the sum payable at the maturity of the note uncertain, and that thereby one of the elements of negotiability, certainty as to the amount due, does not exist. It seems to be conceded in the argument that if the facts of this case bring it within the rule established in *Sperry v. Horr*, 32 Iowa, 184, the judgment below should be affirmed, unless we are prepared to overrule the *Sperry case*. The provision in the note in the *Sperry case*, reads: "If not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorney's fees therefor." It was held in that case that as the provision quoted related to the remedy, and only became operative in case suit should be brought, it could in no way render uncertain the sum due upon the note at its maturity.

It is urged that the provision in the note in this suit contemplates that the note may be placed in an attorney's hands for collection at any time, before, as well as after, maturity; hence that the amount due at maturity would be dependent, to a certain extent, on the fact that it was or was not thus placed in the hands of an attorney for collection before its maturity; that an element of uncertainty as to the amount due at the maturity of the note is thus introduced, which does away with its negotiability. If the appellant's construction of this clause is correct, then one taking such a note to-day, which is not due for five years, may, by at once placing it in an attorney's hands, to be by him held until paid or until maturity, and collected if not then paid, compel the maker to pay ten per cent. in addition to the face of the note, even though he may in fact pay it before it matures. We do not think the language used, considered in connection with the provisions of the entire note, warrants such interpretation.

Ordinarily, we understand the word "collect," as applied to an indebtedness, to mean that which may lawfully be done by the holder of the obligation to secure its payment or liquidation after its maturity. The words "for collection," as used in the note, convey the same meaning as the words "to collect." We think it is clear that, under a provision like that under consideration, no attorney's or collection fees could be claimed, even in the absence of the statutory provisions prohibiting it, for any work, labor or service of the attorney holding such a note, which was done or rendered with regard to it prior to its maturity.

Under this construction of the language used the case is clearly within the holding in the *Sperry case*, *supra*. But it is said that that holding is against the weight of authority generally, and hence it should not be adhered to. It must not be forgotten that the fact that there is a conflict in the decisions, touching the question as to whether a provision like that in the *Sperry case* would render an instrument non-negotiable, was considered in that case. The doctrine announced in that case has been the law of this state for over twenty years, innumerable contracts have been made on the faith of it, and the decision is supported by an abundance of authority. *Stoneman v. Pyle*, 35 Ind. 103; *Seaton v. Scovill*, 18 Kan. 433; *Gaar v. Louisville Banking Co.*, 11 Bush. 180; *Heard v. Bank*, 8 Neb. 10; *Dietrich v. Bayhi*, 23 La. Ann. 767; *Overton v. Matthews*, 35 Ark. 147; *Farmers' National Bank v. Rasmussen*, 1 Dak. 60, 46 N. W. Rep. 574; 1 Daniel on Negotiable Instruments [4 Ed.], section 62a; *Hubbard v. Harrison*, 38 Ind. 323; *Nickerson v. Sheldon*, 33 Ill. 372; *Schlesinger v. Arline*, 31 Fed. Rep. 648; *Montgomery v. Cross-thwait*, 8 S. Rep. 498, 90 Ala. 553; *Bank of Commerce v. Fuqua*, 28 Pac. Rep. (Mont.) 291; *Dorsey v. Wolff*, 32 N. E. Rep. (Ill. Sup.) 495; *Pate v. Bank*, 63 Ind. 254; *Maxwell v. Morehart*, 66 Ind. 301; *Proctor v.*

*Baldwin*, 82 Ind. 370; *Wilson Sewing Machine Co. v. Moreno*, 7 Fed. Rep. 806; *Howenstein v. Barnes*, 5 Dill. 482; *Adams v. Addington*, 16 Fed. Rep. 89; Tiedeman on Commercial Paper, section 28b; 1 Randolph on Commercial Paper, sections 205, 206; 2 Parsons on Notes and Bills, pp. 146, 147; 2 Am. and Eng. Encyclopedia of Law, p. 324; *Benn v. Kutzschan*, 32 Pac. Rep. (Or.) 763; *Washington v. Bank*, 64 Tex. 4; *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 3 C. C. A. 1, 52 Fed. Rep. 191.

Our statute expressly provides that attorney or collection fees shall "be allowed by the court and taxed as a part of the costs." Acts of the Eighteenth General Assembly, chapter 185; *Kelso v. Fitzgerald*, 67 Iowa, 266; *Spiesberger v. Thomas*, 59 Iowa, 606; *McCormick v. Lundburg*, 74 Iowa, 558. It was said in the case last cited: "The attorney's fee which, under the terms of the note, might be taxed against the plaintiff on the action for the enforcement of the note, does not pertain to the debt evidenced by it, but is in the nature, rather, of costs." The collection fee, then, in the case at bar, can in no event form a part of the debt proper; it pertains only to the remedy; it is made, by law, a part of the costs. It follows, then, that such a provision can not be said to render uncertain the amount due upon the note at its maturity. That is fixed and certain, and can not be affected by any provisions which relate only to the remedy in case the debt is not paid at maturity. The contract must be construed in the light of the statutes applicable thereto, and with reference to which it will be presumed the parties to the contract acted. The note being negotiable, and purchased by the plaintiff before due, in the usual course of business, for value, and without notice of the equities of the defendant, the case was properly taken from the jury.

The judgment below is **AFFIRMED**.

JOHN BYERS *et al.*, Appellees, v. THOMAS C. JOHNSON,  
Appellant.

1. **Sheriff's Deed Construed as Mortgage: MONEY LOANED FOR REDEMPTION: EVIDENCE.** A part of the sum necessary to redeem certain real estate from a sale under execution was advanced by the defendant, under a parol agreement that he would redeem the premises for the benefit of the owner, and that, if the same were not redeemed at the end of a year from the date of the sale, he would take a sheriff's deed in his own name, and hold the property until such time as the owner should pay him all the money he had expended, and thereupon his interest therein should cease. The premises were worth double the amount necessary to redeem, and, after the defendant acquired a sheriff's deed, the owner continued in possession thereof for about five years, and until the day of her death, making leases therefor, paying taxes and insurance, and collecting a part of the rents. *Held*, that the evidence was sufficient to show that the sheriff's deed was taken by the defendant for the purpose of security only.
2. ———: ———: **STATUTE OF FRAUDS: PRACTICE IN SUPREME COURT.** The question whether such an agreement is within the statute of fraud, and therefore not enforceable, not having been raised in the district court, *held*, that it would not be considered by the supreme court.
3. ———: ———: **WIFE'S INTEREST IN HOMESTEAD SUFFICIENT TO SUPPORT AGREEMENT.** The interest of a wife in a homestead, the legal title to which is in the husband, who has abandoned his wife, is such as will entitle her to protect the property in the manner above stated.
4. ———: ———: **LIMITATION OF ACTIONS.** The statute of limitations against an action for the recovery of real estate held under an absolute deed, but intended as a mortgage, begins to run from the date of the last payment upon said mortgage by the mortgagor, and not from the date of the agreement under which said deed was acquired.
5. **Pleading: ISSUES: EVIDENCE.** The plaintiff's petition alleged that one S. was the "sole and only heir at law" of the owner of said real estate, and the answer excepted from its denial of the allegations of the petition the fact of the relationship of S. to said owner. *Held*, that, it not having been questioned in the district court that S. was the only heir, the admission of the answer would be considered in the supreme court as intended to admit the allegation of the petition in regard to the heirship of S.

*Appeal from Poweshiek District Court.*—HON. A. R. DEWEY, Judge.

THURSDAY, OCTOBER 12, 1893.

ACTION in equity for an accounting, and to compel the conveyance of certain real estate to the plaintiffs. There was a hearing on the merits, and a decree in favor of the plaintiffs. The defendant appeals.—*Affirmed.*

*Haines & Lyman*, for appellant.

*John T. Scott and W. R. Lewis*, for appellees.

ROBINSON, C. J.—For some time prior to the first day of January, 1883, John Byers owned lot number 5 of the northeast quarter of the northwest quarter of section 23, in township 8, north, of range 14, west. On the date specified, he and his wife, Eliza, executed and delivered a mortgage on the premises described to secure an indebtedness to T. J. and W. T. Holmes. During or about the month of December, 1884, a decree was rendered against John Byers on account of that indebtedness for the sum of one thousand, eight hundred and thirty-five dollars and three cents and costs, and foreclosing the mortgage. On the seventh day of February, 1885, the mortgaged premises, which included two or more buildings, were sold to the mortgagees for the sum of two thousand, ninety-two dollars and seventy-six cents. Byers and his wife lived upon the premises as a homestead both before and after the mortgage was given, but he deserted and abandoned his wife before the transactions in controversy occurred, and thereafter she appears to have managed the property, and to have lived upon it during most of the time until her death, which occurred in January, 1892. In October, 1885, the

sheriff's certificate of sale was assigned to the defendant, and in due time a sheriff's deed was issued to him for the premises.

In November, 1891, Mrs. Byers commenced this action, claiming in her petition that having only eight hundred dollars, and being desirous of purchasing the premises, she entered into a verbal agreement with the defendant, who was her brother, by the terms of which he was to furnish her with so much money as should be necessary to purchase the certificate of sale, and, if the premises were not redeemed at the end of a year from the date of the sale, to take a sheriff's deed in his own name, and hold the premises until such time as she should pay to him all the money by him expended, and that the sheriff's deed should be treated and considered as a mortgage as between her and the defendant; that in pursuance of the agreement she gave to the defendant eight hundred dollars, with which he, with one thousand, four hundred dollars he had borrowed for the purpose, purchased the certificate of sale, taking an assignment thereof in his own name; that at the expiration of the time for redemption a sheriff's deed was executed to him; that by the terms of the agreement she had retained possession of the premises; that she had fully paid the defendant for the money he had advanced, and demanding that he be required to account for the money he had received and expended under the agreement; that, if anything remains due him, it be ascertained, and that he be requested to convey the premises to her. Mrs. Byers died intestate, and, after her death, John Byers, the husband, and Eliza J. Stephenson, her sole heir, were substituted as parties plaintiff. The defendant denies the agreement upon which the plaintiffs rely, and denies that he has been paid any money by the decedent since the making of the sheriff's deed. He claims to have paid two thousand, two hundred and **fifty-three** dollars and

twenty-five cents for the sheriff's certificate, and to have discharged, at a cost of seventy-three dollars and twenty-nine cents, a tax lien on the premises at the time of the purchase; that he has paid taxes since that time, and for insurance and repairs, sums amounting to about five hundred and forty dollars; and that he is the absolute owner of the premises. He "admits" that at the time of the purchase he borrowed of his sister seven hundred and thirty-five dollars with which to make, in part, the purchase; that it was not intended that the loan so made should be repaid in money, nor that she should have any interest in the premises in question, but that he agreed to furnish her a home and take care of her while she lived; that in pursuance of that arrangement she spent a large part of two years at his home, receiving her entire support from him; that she received and retained large sums of money which belonged to him; that he is ready and willing to pay, to anyone entitled to receive it, any money which he may be owing to her estate. The district court found and adjudged that the plaintiff Byers is the owner, and entitled to the conveyance, of an undivided one third of the premises in controversy, and that the plaintiff Mrs. Stephenson is the owner, and entitled to a conveyance of the remainder, and that conveyances be made accordingly.

I. The appellant admits that a deed absolute in terms may be shown to be a mortgage, but relies upon the rule that to show that such is the case the evidence must be clear, satisfactory and conclusive, and insists that the evidence in this case is not of that character and weight. It is shown that the property in controversy was worth at least twice as much as the amount required to redeem it from the sheriff's sale. Mrs. Byers was anxious to obtain the property, and had several interviews with T. J. and W. T. Holmes in regard

1. SHERIFF'S deed construed as mortgage: money loaned for redemption: evidence.

to it. The defendant applied to them to redeem it for the benefit of Mrs. Byers. He was told the certificate was not for sale unless it was to benefit her. The defendant procured an assignment of the certificate only by representing that he was acting for her, and that the purchase was for her benefit. It is shown to our entire satisfaction that before he obtained the assignment he had agreed with Mrs. Byers to obtain it for her, and to procure and furnish the money which she lacked to pay for the certificate, and that the entire transaction was for her benefit, and ultimately to vest in her the title to the property; that the assignment was made to the defendant only to secure him for the money he had advanced, and that his interest in the property was to cease when he should be reimbursed for the money expended for the benefit of his sister. She never surrendered possession of the property, but retained it until her death, making agreements for leases, paying taxes and insurance, and by herself or agent collecting much of the rent. We reach the conclusion that the claim of plaintiffs, that the defendant took an assignment of the certificate and the sheriff's deed only as security for the money he advanced, is fully and satisfactorily established by the evidence.

II. It is said that the agreement, if made as claimed by the plaintiffs, can not be enforced for the reason that it is verbal, for the conveyance of real estate, and therefore within the statute of frauds. The claim is not made in the pleadings, and appears to have been made for the first time in this court, and will therefore not be considered further. *Holt v. Brown*, 63 Iowa, 322; *Bolton v. McShane*, 79 Iowa, 27; *Crossen v. White*, 19 Iowa, 111.

III. It is said Mrs. Byers had no title to the property, and no interest therein which she could mortgage;

2. —; —;  
wife's interest  
in homestead  
sufficient to  
support agree-  
ment.

therefore, that the agreement can not be enforced. As we have stated, the premises were occupied by Mrs. Byers and her husband as a homestead until he deserted her. Her interest therein was an existing right, which she was entitled to protect. *McClure v. Braniff*, 75 Iowa, 43. It was entirely competent for her to do so by arranging for the purchase of the sheriff's certificate of sale, and, as she was unable to effect the purchase in her own name, she was authorized to have it made in the name of her brother. She paid to him a part of the purchase price when the assignment of the certificate was made, retained possession of the property when the sheriff's deed was executed, and from time to time made payments to him on account of the purchase price. These facts gave her a right to the property which a court of equity will protect and enforce. See *Sweeney v. O'Hara*, 43 Iowa, 34; *Green v. Turner*, 38 Iowa, 112; *Judd v. Mosely*, 30 Iowa, 424; *Bryant v. Hendricks*, 5 Iowa, 256; *McIntire v. Skinner*, 4 G. Greene, 89; *Roberts v. McMahan, Id.*, 34; *Brooks v. Ellis*, 3 G. Greene, 527; *McCoy v. Hughes* 1 G. Greene, 370; 1 Jones on Mortgages, section 241. In *Hain v. Robinson*, 72 Iowa, 736, a case relied upon by the appellant, it appeared by the petition that the plaintiff had made a verbal agreement with Robinson under which the latter purchased at tax sales certain real estate owned by the former, and subsequently obtained therefor tax deeds, on condition that when Hain should pay to Robinson the sums of money he should pay on account of taxes, with interest, the latter should convey the real estate to Hain. A demurrer to the petition was sustained. In affirming that ruling this court held that such an agreement could not be established by parol, but it was said that a different rule would prevail if the plaintiff had furnished the money for the purchase. The case is not in conflict with the conclusion we have announced, and the same

is true of *Thorp v. Bradley*, 75 Iowa, 51, also relied upon by the appellant.

IV. It is claimed that this action is barred by the statute of limitations. The final payment on account of the money advanced by the defendant under the agreement in question was not made until a few months before this action

4. —: —: limi-  
tation of ac-  
tions.

was commenced, and the statute would begin to run from that time, and not from the time he obtained the assignment of the sheriff's certificate of sale. See *Green v. Turner*, 38 Iowa, 116. In fact, the appellant insists that final payment has not yet been made, and that the amount now due him, if the agreement relied upon by the plaintiffs be sustained, is nearly, if not quite, five hundred dollars. Counsel have analyzed and discussed the evidence in regard to payments at considerable length to show that the defendant has paid out more money on account of the premises in controversy than he has received. It would not be profitable to consider in detail the facts upon which the appellant relies to sustain his claim on this branch of the case. It is sufficient to say that there is much confusion in the accounts, and the defendant has offered no evidence to explain them. It appears that when Mrs. Byers and the defendant entered into the agreement in question, she had eight hundred dollars, which were paid to and used by the defendant in purchasing the certificate. He borrowed one thousand and four hundred dollars, to be used for the same purpose, giving therefor his two promissory notes for five hundred dollars each, and one for four hundred dollars. Portions of the premises in question were leased by Mrs. Byers to different tenants. It was estimated that the rents to accrue from them would pay the amount advanced by the defendant in four years. At one time three tenants paid in the aggregate about sixty dollars per month, and Mrs. Byers also received rent from others. Some of the money was paid

to Mrs. Byers, and some to the defendant. Portions of the property were vacant at times, but the total income from all the property from the twenty-eighth day of October, 1885, when the certificate of sale was assigned to the defendant, to the time this action was commenced, was two thousand, four hundred and forty-seven dollars and fifty cents. Taxes were paid to the amount of four hundred and eighteen dollars and seventy cents, and insurance and repairs cost an amount not definitely shown, but probably less than two hundred and twenty-five dollars. Mrs. Byers' personal expenses amounted to but little, and substantially all the revenue derived from the property was used in paying taxes, for insurance and repairs, and to pay the defendant or the notes he had given. In addition, Mrs. Byers sold him a cow for twenty-five dollars, and paid him some other small sums, which were used for the same purposes. It thus appears that the amount realized from rents and other sources was sufficient to pay the defendant the amount he had advanced on account of the property, including interest. On the fifteenth day of November, 1889, the defendant gave a promissory note for two hundred and seventy-six dollars and ninety cents for the purpose of paying the last of the three notes he had given in 1885 for the money he borrowed to use in purchasing the sheriff's certificate. That note was paid by Mrs. Byers, and a witness who was fully informed in regard to the facts says, in effect, that it was given for all for which Mrs. Byers was then liable under her agreement with the defendant, and that, when it was paid, her obligation to him was fully discharged. There is other evidence which tends to support our conclusion that the defendant has been paid all he was entitled to receive on account of the premises in controversy.

V. It is claimed that there is no proof that the plaintiffs are the only heirs of Mrs. Byers. The

5. PLEADING: issues: evidence.

amendment to the petition by which they were substituted as parties plaintiff for Mrs. Byers, deceased, alleges that she left, surviving her, the said Byers, her husband, and Eliza J. Stephenson as her sole and only heir at law. The answer excepts from its denial the averment of the petition in regard to the relationship of the plaintiff. It is said that to admit the relationship does not admit that Mrs. Stephenson is sole heir, as alleged; but that is the only relationship which the petition states with respect to her, and, as there was no controversy in the district court in regard to that matter, we are satisfied that the answer was intended by the defendant, and understood by the plaintiffs, to admit what the petition averred in regard to heirship, and it must be given that effect.

A careful examination of the entire case leads us to conclude that the decree of the district court is sustained by the evidence and authorized by the law. It is therefore **AFFIRMED**.

89	286
121	387
89	286
126	198

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**THOMAS ROGERS FOR HIMSELF AND AS NEXT FRIEND  
OF OTHERS, Appellant, v. ALICE D. Mc-  
FARLAND *et al.*, Appellees.**

**Homestead: TRUSTS: EVIDENCE.** Where, upon a sale of a homestead, purchased by a husband with his own money, the wife refused to join in the conveyance thereof unless the deed for property to be purchased with the proceeds of said sale was made to her, and the husband consented to have the deed so made, upon being advised that if the property was to be occupied as a homestead neither he nor his wife could alone dispose of, or incumber the same, and thereafter the wife procured a divorce from her husband, and occupied the property thus conveyed to her with a second husband and her children, *held*, that the evidence was insufficient to establish a trust as to said property for the benefit of the husband and his children.

*Appeal from Delaware District Court.*—HON. JOHN J. NEY, Judge.

FRIDAY, OCTOBER 13, 1893.

ACTION in equity to have a certain conveyance of real estate decreed to be in trust, and to have the title to such real estate decreed to be vested in certain beneficiaries of the alleged trust. After the evidence had been fully submitted on the part of the plaintiff, the court sustained a motion to dismiss the petition, and rendered judgment in favor of the defendants for costs. The plaintiff appeals.—*Affirmed.*

*Blair, Dunham & Norris*, for appellant.

*Bronson & Carr*, for appellees.

ROBINSON, C. J.—The plaintiff is the father, and the defendant Alice D. McFarland is the mother of Eva S., Emory J., Etta M., and Ethel P., Rogers, all of whom are minors, the eldest being about fourteen years of age. For many years prior to 1888 the parents lived together as husband and wife. About the year 1880 the plaintiff purchased about eighty acres of land in Delaware county, and thereafter occupied it with his wife and children as a homestead, until March, 1886. He then sold it for the sum of \$2,000, and with a part of the proceeds purchased two thirty acre tracts in the same county, one of which was improved and occupied by the plaintiff and his family as a homestead. The title to these two tracts was taken in the name of the wife. In August, 1887, the wife left the plaintiff, and in the first part of the next year obtained a divorce from him. She undertook to care for and support their children, and they have made their home with her since the divorce was granted. After a while she married her codefendant, James McFarland, and now lives with

him upon the thirty acre tract of land purchased in the year 1886, and then occupied as a homestead. The plaintiff claims in his petition that the deed for the two thirty acre tracts was drawn to his wife as grantee without his knowledge or consent; that it was his desire that the deed should be executed to him; that being surprised and importunately pressed by his wife and others interested for her, and not being fully aware of the consequences of his act, after many objections he allowed her name to remain in the deed as grantee, with the understanding on his part, acquiesced in by her, that she was to hold the title in trust for him and their children, and that it was to be occupied by them as a homestead; that she procured the deed to be made to herself through fraud, by misrepresenting to him the purpose for which she would hold the title; that his mind was enfeebled by illness, and he was not fully aware of the consequences of his act, which fact she knew, and of which she took an unconscionable advantage; that, after obtaining the title, as stated, she commenced a system of abuse to him, and made their married life miserable, with intent to bring about a separation and obtain a divorce; that the defendant James McFarland, with his three children, has moved into the homestead acquired in 1886, and is occupying it, to the injury and disadvantage of the children of the plaintiff; that he is informed that the defendants contemplate a sale of the land, and he fears that, unless Mrs. McFarland is divested of her trust, the land will be sold, and the children of the plaintiff will be deprived of their home. He brings this action in his own right, and as the next friend of his children, and asks that the conveyance made to his wife in 1886 be decreed to be in trust for the benefit of himself and his children; that she be divested of the trust; and that the title to the premises be decreed to be in his children. He also asks that the defendants be enjoined from selling the

premises. The defendants deny that the title held by Mrs. McFarland was obtained by fraud or in trust, and aver that when the plaintiff proposed, in 1886, to sell their farm and buy the land in question, she refused to consent to the sale, or to join in a deed, unless a part of the proceeds of the sale should be used in the purchase of other land, which should belong to her when purchased; and that the conveyance to her was made pursuant to an agreement between herself and the plaintiff to that effect.

It appears that when the sale of the farm owned by the plaintiff was made, in 1886, his wife refused to sign the deed unless the deed to the property in question was made to her. The plaintiff objected to having it so made, and the conveyancer who drew the deed was asked as to the effect of the deed, and, upon being told that the premises it conveyed were to be used as a homestead, stated to the plaintiff that neither he nor his wife could alone dispose of or incumber the place, and the plaintiff then consented to the conveyance to his wife. He paid for the first homestead, his wife contributing nothing to it, and it may be that he expected, when the land in question was purchased, to be permitted to occupy it, with his children, as a home, so long as he should desire to do so, but the evidence fails to show any express understanding to that effect. Although the legal title to the first homestead was vested in the husband, yet it could not have been conveyed or incumbered without the consent of the wife. Code, section 1990. She had a vested right in it, which she was entitled to protect by suitable measures. See *Byers v. Johnston*, ante, p. 278; *Boling v. Clark*, 83 Iowa, 481; *McClure v. Braniff*, 75 Iowa, 43. What her reasons were for refusing to join in a conveyance of that homestead unless the title to the land to be purchased was vested in her is not shown. It may be she foresaw a separation from her husband, and that

the support of her children would devolve upon her. But her motives are immaterial. She had a legal right to refuse to release her interest in the first homestead unless the plaintiff should comply with her demands. It is not shown that she resorted to fraud, nor that she misrepresented any fact, to accomplish her purpose. It is not shown that her separation from the plaintiff was the result of her fault. On the contrary, as she obtained the divorce, the legal presumption is that the separation was caused by wrong on his part. He has not shown that he consented to the conveyance to his wife in consequence of any feebleness of mind or misunderstanding as to the result of his act. He has failed to show that his children have been deprived of any rights, or that they are in danger of being deprived of a home and support. An express trust can not be established by parol evidence (Code, section 1934; *Brown v. Barngrover*, 82 Iowa, 208; *Andrew v. Concannon*, 76 Iowa, 253); and parol evidence to establish a resulting trust must be clear and satisfactory. *Murphy v. Hanscome*, 76 Iowa, 194; *Richardson v. Haney*, 76 Iowa, 103. The evidence in this case fails to establish a trust of any kind, or to show that the plaintiff, for himself or as next friend of his children, is entitled to any relief. Since the effect of what was done by the district court was to deny him relief, its judgment is AFFIRMED.

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BERGMAN & McKINLEY, Appellants, v. J. G. GUTHRIE,  
Intervenor, Appellee.

**Landlord's Lien: GARNISHMENT: PRIORITY OF LIENS.** Where property subject to a landlord's lien and also to chattel mortgages, held by the landlord, was sold at public auction under an agreement between the landlord and his lessee that the proceeds of such sale should be received by the landlord, and applied to the payment of the rent due and of the mortgage indebtedness, *held*, that the right of the landlord to money due for property purchased at such sale was superior to that of a judgment creditor of the lessee under a garnishment of a purchaser subsequent to said agreement.

*Appeal from Jasper District Court.*—HON. DAVID RYAN,  
Judge.

FRIDAY, OCTOBER 13, 1893.

THE plaintiffs, by the process of garnishment, seek to appropriate, as the property of their judgment debtor, certain money owing by the garnishees, and claimed by the intervenor. There was a trial by the court without a jury, and a judgment in favor of the intervenor. The plaintiffs appeal.—*Affirmed.*

*W. O. McElroy*, for appellants.

*Alanson Clark*, for appellee.

ROBINSON, C. J.—On the ninth day of February, 1892, J. P. Bell and B. W. Blackwood were garnished, under a general execution issued from the office of the clerk of the district court of Jasper county, on a judgment in favor of the plaintiffs, and against the defendants G. S. Guthrie and others, as supposed debtors of said Guthrie. On the same day G. W. Harlan and Ed Donahey were likewise garnished under a general execution issued by the same clerk on another judgment in favor of the plaintiffs and against the defendants, as supposed debtors of said Guthrie. On the same day J. P. Bell and D. G. Wheatcraft were garnished under a general execution issued by the same clerk on a judgment in favor of Reeves & Company, and against the defendant G. S. Guthrie and others, as supposed debtors of said Guthrie. The answers of the garnishees were taken, and each one answered that he was indebted to said Guthrie for a sum specified, on account of personal property purchased of him at public auction on the day of the garnishment. Notice was thereafter given to said Guthrie, requiring him to appear in court on a date specified, and show cause why judgment should not be

rendered, condemning the money in the hands of the garnishees. In March, 1892, J. G. Guthrie appeared and filed in each of the garnishment proceedings a petition of intervention, in which he alleged that he was the owner of certain land which was described; that he had made a written lease therefor to said G. S. Guthrie for the term of three years from the first day of March, 1889, at the annual rent of eight hundred and fifty dollars, of which two hundred and eighty dollars were to be paid on the fifteenth day of October, and five hundred and seventy dollars on the first day of March of each year; that, before the termination of the lease, G. S. Guthrie, with the consent of the intervenor, advertised and made a public sale of a large quantity of stock, grain and implements upon the leased premises, with the oral agreement between them that the entire proceeds of the sale should belong and go to the intervenor, and be credited upon rent due, and to become due, as provided in the lease; that the proceeds were to be accepted and taken by the intervenor, in person, and that G. S. Guthrie was not to receive any of them until the debt of intervenor should be fully paid; that all of the property sold, and all that purchased by the garnishees, was covered by, and subject to, his landlord's lien; that the garnishees knew at the time of the sale that the property they were buying was subject to his said lien; that there is due to intervenor for rent more than six hundred dollars; that the garnishees were fully informed of his rights before any of the property sold was taken; that he is the absolute owner of the money shown to be due by their answers; and that there is no other property from which the amount due him can be satisfied. He asks that he be adjudged to be the owner of the proceeds of the sale in the hands of the garnishees. The answer of the plaintiffs to the petition of intervention in each case admits the sale and garnishment, but denies that the

intervenor is entitled to the proceeds in the hands of the garnishees. The issues made in the three cases were tried together, and before judgment Bergman & McKinley were substituted for Reeves & Company as plaintiffs in the case in which the latter had obtained judgment, and the proceedings in the three cases were consolidated, and afterward judgment without costs was rendered in favor of the intervenor, and against each garnishee, for the sum of money he was owing, and against the plaintiffs for costs of the garnishment proceedings.

The appellants admit that the garnishments were effectual to secure the interest which G. S. Guthrie actually had at the moment of garnishment in the money which the garnishees were then owing, but they insist that the evidence fails to show an assignment of such money which was effectual to place it beyond the reach of garnishment process. The district court was authorized to find from the evidence that the material facts were substantially as follows: The intervenor, while owner of certain land, gave to his son, the defendant, George S. Guthrie, a lease thereof, as stated in the petition of intervention. In February, 1892, the son was owing his father a considerable sum of money for rent, and other money, which the latter had paid for him as surety. The money due and to become due for rent was secured by a landlord's lien on grain, stock, and other personal property, and some of the other indebtedness was secured by two chattel mortgages on horses, cows, and sheep. It was agreed between the father and son that the stock and grain which was held as security for the money which the latter was owing to the former should be sold at public auction, and the proceeds thereof should be delivered to the father, to pay the amount the son was owing him. A sale was accordingly made on the the ninth day of February, 1892, which the father attended, for the purpose of approving the notes and security taken, and receiving

the proceeds of the sale. The notices of garnishment were served after the garnishees had purchased the property, the price of which is in controversy, but before they had settled for it. The father received all the proceeds of the sale, excepting the sums which were due from the garnishees. The amount realized at the sale was about one thousand and two hundred dollars, of which seven hundred and seventy-seven dollars were applied on account of notes which the father had paid as surety, and the remainder was applied on rent. A part of the mortgaged property was not sold on February 9, 1892, but was afterward sold under foreclosure of the chattel mortgages, and the proceeds applied in paying the mortgage indebtedness. There is still due the father for rent the sum of three hundred and forty dollars, besides interest, and the aggregate amount due from the garnishee was three hundred and fifty-six dollars and seventy-five cents, or not more than enough to pay the intervenor the balance due him. All the property purchased by the garnishees was corn and hogs raised upon the leased premises. The intervenor appears to have liens upon substantially all the property sold, and the effect of the arrangement he made with his son was not to release the liens, but to recognize and enforce them, by a sale of the property subject to them, and an application of the proceeds in payment of the debts. The intervenor alone was entitled to the proceeds, and he could have compelled the purchasers to settle with him for the amounts of their bids, and that, in effect, he required them to do. Since the agreement was made before the garnishments were effected, and the proceeds of the sale were not sufficient to pay the amounts which the son owed to the intervenor, it follows that the son had no right to the money which the garnishees were owing for their purchases, and that the execution creditors acquired nothing by their garnishments.

The judgment of the district court is **AFFIRMED**.

JONAS R. GRINDEM, Appellant, v. ALENE J. GRINDEM  
*et al.*, Appellees.

**Will: CONDITIONAL DEVISE: ELECTION OF DEVISEE.** By the terms of a will the homestead was given to the testator's daughter, "provided that my said daughter \* \* \* shall make my said homestead her home; otherwise she is to receive in lieu thereof the sum of three hundred dollars." *Held*, that the devise was conditioned upon the daughter's occupation of the homestead, and that by abandoning the homestead, and taking up her residence elsewhere, she elected to take the bequest of three hundred dollars in lieu of the devise.

*Appeal from Story District Court.*—HON. S. M. WEAVER,  
 Judge.

FRIDAY, OCTOBER 13, 1893.

THIS is a suit in equity between the legatees and devisees under the last will and testament of I. J. Grindem, deceased. There was a demurrer to the petition, which was sustained, and the petition was dismissed. The plaintiff appeals.—*Reversed*.

*J. F. Martin*, for appellant.

No appearance for appellee.

ROTHBOCK, J.—The rights of the parties depend upon the proper construction of the said will. The following is a copy of that instrument:

"I give to my daughter Seri the sum of one hundred dollars, to be paid out of my estate, as hereinafter provided. To my daughter Martha Johanna I give, devise, and bequeath the sum of twenty-five dollars, to be paid her in like manner. To my daughter Karen Sophia I give, devise, and bequeath the sum of twenty-five dollars, to be paid in like manner with the above described. To my daughter Alene Josephine I give, devise and bequeath the block of land on which my

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93	464
89	296
101	355
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102	347
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107	610
89	295
121	71

house stands, said block to be of the same size and dimensions as the block laying immediately north of my house; also the house I am now living in, and known as my homestead, and furniture and interests therein contained, provided that my said daughter Alene Josephine shall make my said homestead her home; otherwise she is to receive in lieu thereof the sum of three hundred dollars, to be paid to her when my son, Jonas Reggiens, shall have attained to the age of twenty-one years. To my daughter Johanna Severin I give and bequeath the sum of fifty dollars, to be paid her in like manner, at the majority of my son, Jonas Reggiens. And, lastly, to my son, Jonas Reggiens, I give, devise, and bequeath all the residue of my property, both real and personal, of which I shall die seized, and which shall remain after the above mentioned sums shall be paid to my above named daughters, provided that my son, Jonas Reggiens, shall have, hold, and enjoy all the property of which I shall die seized, and remaining after my just debts shall have been paid, until he shall have attained to the age of twenty-one years, when my daughters above mentioned shall be paid out of the said property, personal and real, the respective portions allotted and bequeathed to them."

The plaintiff is the son named in the will as Jonas Reggiens, and it is averred in the petition, in substance, that he is now twenty-one years old, and that the defendant Alene Josephine long ago abandoned the said premises as her home, and took up her residence elsewhere, and has never made said homestead her home, and that, by reason of said abandonment, the plaintiff has become the absolute owner of the real estate to which said Alene Josephine would have been entitled if she had not abandoned the same, and that he is now in possession of the same. It is further averred in the petition that said Alene Josephine elected to take the three hundred dollars provided for

in said will, and that the plaintiff has tendered to said Alene Josephine the three hundred dollars due her, and brings the same into court for her.

The will was admitted to probate in the month of February, 1889. There was a general demurrer to the petition, which was sustained, and the sole question presented on this appeal is whether the devise of the real estate in controversy to Alene Josephine was absolute, and the proviso therein void, or whether the devise should be held to be conditional and inoperative in case the devisee should elect to make the homestead of her mother "her home." The district court held that the devise was absolute. It appears to us that it was conditional, or rather that, by the plain language of the will, Alene Josephine was given her choice to take the real estate absolutely, or to take three hundred dollars. She could not have both, and, by failing to make her home on the homestead, she elected to take the three hundred dollars. The proviso is not merely precatory or recommendatory in character. It is an absolute provision that, if the devisee does not make the property her home, she shall receive "in lieu thereof the sum of three hundred dollars." This as plainly provided that she shall not have the land unless she makes it her home as if the will had so declared in express words. We have recently had occasion to examine the question as to the proper construction of a will where the same question was involved which we have in this case. See *Stivers v. Gardner*, 88 Iowa, 307. Much that is said in that case as to the proper rules of construction of a will is applicable to this case, and it appears to us that the decision in that case is really decisive of this. The ruling of the district court sustaining the demurrer is REVERSED.

JAMES L. CAMERON, Appellant, v. ADOLPH GMINDER  
*et al.*, Appellees.

**Liquor Nuisance: INJUNCTION: EXTENT OF LIEN FOR COSTS.** Where, in an action to enjoin the sale of intoxicating liquors contrary to law upon certain premises, it appeared that the liquors were kept in a room in the cellar of the dwelling house occupied by the defendants, who were husband and wife, but no right of homestead was claimed, *held*, that a lien for the costs of such proceeding should have been decreed against the entire premises, and not simply against the room in which the liquors were kept.

*Appeal from Winneshiek District Court.*—HON. L. O. HATCH, Judge.

FRIDAY, OCTOBER 13, 1893.

THIS is a suit in equity to abate a nuisance, and to enjoin the defendants from keeping or selling intoxicating liquors, contrary to law, in a certain building upon land owned by the defendants. There was a trial upon the merits, and a decree for the plaintiff. The plaintiff appeals, and claims that the decree should have granted further relief.—*Reversed.*

*John B. Kaye*, for appellant.

*George W. Adams*, for appellees.

ROTHROCK, J.—The decree from which the appeal was taken is as follows:

“That defendant, Adolph Gminder, at the commencement of this action, and for some time prior thereto, and with the knowledge of the defendant, Mari Gminder, kept, either for himself or as agent for another, intoxicating liquors, to wit, beer, in a room in the southeast corner of the cellar of the dwelling house

occupied by defendants, and situated on said premises, with the intent to sell the same contrary to law, and that the room so used is a nuisance. It is, therefore, ordered that said nuisance be abated, and that the defendant, Adolph Gminder, be, and he is, hereby enjoined from keeping or selling intoxicating liquors, contrary to law, in said room, or elsewhere in this judicial district, and that he pay the costs of this action, including an attorney's fee of forty dollars, and that the same be made a lien on said room and the ground covered by the same, and the right of access to the said room from the alley near the said dwelling, through the outside door to said cellar. Both parties except."

This decree is surely broad enough to enjoin the defendant, Adolph Gminder, from keeping and maintaining a nuisance, not only upon the premises described in the petition, but elsewhere in that judicial district. But the complaint is that the costs of the action are not made a lien on the premises described in the petition. We discover no reason why the lien should be restricted to a certain part of the cellar of the dwelling house of the defendants. It is true that it appears from the evidence that a room in the basement was used as a warehouse or a place to store liquors; and it appears incidentally that the defendants are husband and wife, and that they reside in the house of which the room in the cellar is a part. But it does not appear that any right of homestead was made or claimed in the case, or that there should be any part of the premises exempt from the payment of costs because it is a homestead. The decree of the district court, so far as it restricts the lien for costs to the room in the cellar, will be reversed, and the lien will be made operative on the whole premises described in the petition. The plaintiff demands that attorney's fees be fixed for services in this court in the prosecu-

tion of the appeal. The sum of twenty-five dollars will be taxed as such fee, which, with the fee and costs in the court below and costs in this court, will be made a lien upon the premises, as described in the petition. REVERSED.

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117 308

LUCY J. ABEL, Appellee, v. A. L. ABEL, Appellant.

**DIVORCE: ADULTERY: EVIDENCE.** In an action for divorce on the ground of adultery, proof that the defendant visited houses of prostitution, that on one occasion he retired to a room with one of the inmates of such a house, and that at one time, during the absence of his wife from home, two prostitutes were brought to his house, and remained all night, is sufficient to support a decree for the plaintiff.

*Appeal from Harrison District Court.*—HON. G. W. WAKEFIELD, Judge.

FRIDAY, OCTOBER 13, 1893.

**ACTION** for divorce. There was a decree for the plaintiff, and the defendant appeals.—*Affirmed.*

*Charles McKensie* and *S. H. Cochran*, for appellant.

*S. I. King* and *Joe H. Smith*, for appellee.

GRANGER, J.—The grounds upon which the divorce is sought are drunkenness and adultery. Both grounds are fully established by the testimony. It is true that, as to the latter ground, there is no direct testimony showing the act of adultery, but the circumstances leave little room to doubt the fact, even though he denies it by his evidence. He visited houses of prostitution, and there is evidence to the effect that on one occasion he retired to a room with one of the inmates. On one occasion, during the absence of his wife from home, two prostitutes were brought to his

house, and remained all night. He denies having knowledge of their real character, but when his course of life is considered, and the circumstances under which they came to his house, it is difficult to believe that they were there except with knowledge on his part of their character and mission. Under such circumstances, his denial of acts of adultery are of little force. We have no doubt whatever of the fact. The charge of drunkenness is equally well, if not better established. It is not important to consider the facts. The testimony, to our minds, is too plain to admit of doubt.

The parties were married in New York in 1880, and came to Harrison county, Iowa, where they have since resided. At the time of the marriage she was forty-eight years of age and he nineteen. She had about five thousand dollars in money, and with a part of it she bought two hundred acres of land in Harrison county, and the same was improved, and has been the home of the parties most of the time since. It is in dispute in the testimony whether or not there has been a gain or loss of property during the years of their marriage. The defendant has done some work on the farm, but on the whole his course of life, in drinking and gambling, has been such that he has been a detriment, rather than a benefit, in the way of accumulating property. He has, however, received from her considerable property. It is, perhaps, unfortunate that the two should have married, but if so, it is no excuse whatever for the course of life adopted by the defendant. The testimony does not show that she was at all in fault for his conduct, or wanting in the proper discharge of her duties. He has chosen a dissolute and profligate life, and to such an extent as to forfeit his marital relations with the plaintiff.

The petition of the plaintiff asks alimony, which, as we understand, the district court did not allow. Because of some language in the decree, there seems

to be doubt on this point, but the appellee disclaims such a construction, and the decree will be construed as having no such effect. The answer of the defendant asks, in case of a decree of divorce, that a part of the property be granted to him. The district court correctly denied such relief. It is not a case where the party in fault is entitled to alimony. The decree is **AFFIRMED.**

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**MARION B. DUTTON, Administratrix, Appellee, v.  
THOMAS SEEVERS, Appellant.**

1. **New Trial: MOTION: AMENDMENT.** A motion for new trial, upon the ground of alleged error in the instructions of the court to the jury, can not be amended, after the expiration of three days after verdict, so as to present, as ground for a new trial, the error of the court in failing to instruct the jury at all as to the burden of proof upon one of the issues in the cause.
2. **Evidence: CONCLUSIONS.** In an action by an administrator to recover for the support of a minor child, maintained by his decedent, *held*, that evidence as to the expectations of the decedent as to the matter of compensation, and his belief and conclusions in relation to the same, was inadmissible.
3. ———: ———. The jury having been instructed that the father of the child was under legal obligation to support it, *held*, that evidence as to what the decedent's expectations were in regard to compensation for supporting the child was immaterial.
4. ———: **ERROR WITHOUT PREJUDICE.** The defendant having admitted in his answer that he was able to maintain the child, *held*, that the exclusion of evidence as to the defendant's financial ability was without prejudice.
5. ———: **JUDGMENT IN ANOTHER ACTION.** The plaintiff's petition alleged that a divorce had been obtained by the child's mother from the defendant, and the latter in his answer admitted the divorce, and set up the provisions of the decree as a defense. In his reply the plaintiff denied the decedent's knowledge of the terms of the decree. The court having instructed the jury that the decree would not bar the plaintiff's right to recover, but that it might be considered in determining the question whether the deceased expected compensation for the services rendered, *held*, that the admission of the decree in evidence, and of testimony tending to show that the deceased had actual knowledge of its provisions, was not erroneous.

89	302
96	696
89	302
130	752

*Appeal from Mahaska District Court.*—HON. J. K. JOHNSON, Judge.

FRIDAY, OCTOBER 13, 1893.

ACTION to recover for the support of a child. There was a verdict and judgment for the defendant. The verdict was set aside, and both parties appeal.—On the plaintiff's appeal, *affirmed*; on the defendant's appeal, *reversed*.

*G. C. Morgan* and *G. W. Lafferty*, for appellant.

*Seevers & Seevers*, for appellee.

KINNE, J.—This is an action by the administratrix of L. K. Dutton, deceased, for recovery of compensation for keeping, boarding and maintaining the child of Thomas Seevers. In 1876, Seevers married the daughter of L. K. Dutton, and the child in question was born to them July 8, 1877. When the child was six months old, the mother left her husband, and she and her father took the child to the father's home, where it was cared for and maintained by him until Dutton's death, in January, 1890. In 1881 Seevers and his wife were divorced, and in said action it was decreed that the mother of the child "shall have the custody, care and control of said child, and shall stand charged with the support thereof, and that the plaintiff [in that action, and defendant in this] shall pay the sum of three hundred dollars, which sum shall be in full of all alimony and support to defendant [in that action], and in full of support of said child." It appeared that defendant had fully complied with the terms and conditions of the decree. There was a trial to a jury, and a verdict for the defendant.

The plaintiff filed a motion for a new trial within three days after the return of the verdict, upon several grounds, among which is the following: "*Third*.

The court erred in its instructions given to the jury numbered from one to eight, inclusive, and in giving each of said instructions, and every part thereof."

More than three days thereafter an amendment to said motion was filed, stating the following, among other, grounds for a new trial:

"*Twelfth.* The court erred in not instructing the jury on which party was the burden of proof to show whether L. K. Dutton expected to be paid for the support of said Eugene N. Seevers, or whether he expected to do so without compensation. *Thirteenth.* The court erred in not instructing the jury that the burden of proof was on the defendant to show that said L. K. Dutton supported said Seevers without compensation, and that he did not expect any compensation therefor. *Fourteenth.* The court erred in not instructing the jury that the burden of proof was on defendant to overcome the presumption of law that defendant was liable for the support of said Eugene N. Seevers. *Fifteenth.* The court erred in not instructing the jury that the presumption of law created a liability on the part of the defendant to support said Eugene N. Seevers, and that the burden of proof was on said defendant to overcome such presumption of liability."

When leave was asked to file this amendment to the motion, the defendant objected thereto, on the ground that the same was not made or filed within three days after the rendition of the verdict. The objection was overruled, to which the defendant excepted. On hearing on the motion, as amended, the same was sustained upon the following ground only, viz.: "Motion for a new trial sustained on the ground that the court had failed to instruct as to burden of proof as to expectation of L. K. Dutton." The defendant excepted to the ruling, and plaintiff excepted to the ruling in failing to sustain the motion and amendment on each of the other grounds therein. Both parties appeal.

I. The defendant having first perfected his appeal, it will be first considered. The only question presented by it is the correctness of the rulings of the court in permitting the amendment to the motion for a new trial to be filed after the expiration of three days from the rendition of the verdict, and in acting thereon. Our statute provides, that the application for a new trial "must be made at the term and within three days after the verdict \* \* \* is rendered, except for the cause of newly discovered evidence." Code, section 2838. It was held in *Sowden v. Craig*, 20 Iowa, 478, that under Revision, section 3114, which is substantially like section 2838 of our present Code, a motion for a new trial, filed within three days, might be afterward amended, provided the amendment "was germane and proper to the object and purpose of the original motion, and could not in any legitimate sense be regarded as a new motion." Tested by this rule, was the amendment properly allowed? The grounds stated in the original motion, in substance, were that the court erred in giving its instructions, in refusing those asked by the plaintiff, and in the admission and exclusion of certain evidence. The ground of the amendment upon which the court granted a new trial was that the court erred in failing to instruct the jury that the burden of proof to show that the maintenance of the child by Dutton was gratuitous rested upon the defendant. It is contended by counsel that the grounds stated in the amendment are merely an "elaboration" of those set out in the original motion heretofore referred to. We can not accede to the correctness of this claim. The ground stated in the original motion, to which it is claimed the amendment is germane, is that the court erred in its instructions given. It can not be reasonably claimed that the error as assigned therein in any wise relates to a failure

of the court to instruct upon some matter not mentioned in the instructions as given. The complaint in the amendment is that the court failed to instruct touching the burden of proof. That is clearly new matter, in no way related to the ground stated in the original motion. The amendment, so far as it related to a failure to instruct as to the burden of proof, was in legal contemplation a new motion, containing a ground for a new trial not germane to those stated in the original motion, and hence the court should not have permitted it to be filed, and, if filed, it should not have been considered. The original motion was not sustained. This is not a case of discretion with the trial court, with which we should be slow to interfere. The question presented to the district court was a legal one. The new trial was granted, not as a matter of discretion, but as a matter of right, because the court thought he had erroneously failed to instruct the jury as to the burden of proof. It is contended by the appellant, and we think with much reason, that the instruction was not vulnerable to the objection urged, but, however that may be, the objection came too late. We are not to be understood as holding that a court may not in a proper case, and under proper circumstances, on its own motion, order a new trial. We have no such case before us. The court granted a new trial upon grounds stated in the amendment, not on its own motion.

II. The plaintiff, in her appeal, complains of the exclusion of certain evidence which was offered for the purpose of showing the expectation of

2. EVIDENCE: conclusions. Mr. Dutton as to receiving compensation from the father of the child for its support. Some of the questions asked the witness to testify to the intention of the decedent as to compensation, others asked for the belief of the decedent as to the same matter, and still others called for the decedent's conclusions. Clearly such evidence is inadmissible. It was for the

jury to say what his intentions, belief and conclusions were, after being advised as to the facts. To have permitted the witness to answer such questions would have been permitting him to testify to his conclusions based upon facts not in evidence.

III. Error is assigned upon the court's refusal to permit Mrs. Dutton to testify as to what her husband said, as to whether or not he expected compensation for supporting the child.

The proposed evidence was immaterial. The court instructed the jury that the law imposed a legal obligation upon the defendant to pay for the keeping of his child. Hence, under the evidence in the case, recovery would follow, unless the defendant established as a fact that Dutton did not expect to be paid. The evidence was properly rejected.

IV. It is urged that the court erred in rejecting evidence relating to the financial condition of the defendant. The defendant admitted in his answer that he was able to maintain his child. One witness testified she did not know of the defendant's pecuniary condition except by hearsay. The other witnesses did testify as to facts within their knowledge touching the property of the defendant, and its value. Even if it be conceded that such evidence is proper in view of the admissions in the answer, still there was no prejudicial error in the rulings complained of.

V. Against the plaintiff's objection, the court admitted in evidence the decree of divorce; also evidence tending to show that Dutton had actual knowledge of it, and of its provisions. It appears that Dutton knew of the decree; that he drew the money ordered to be paid by it for the support of the child. It is said that the plaintiff should not be bound by the decree. The court instructed the jury that the decree would not bar

4. —: error without prejudice.

5. —: judgment in another action.

the plaintiff's right to recover, but they might, if they found its provisions were known to Dutton, and he thereafter made no demand upon the defendant for the maintenance of the child, consider such fact as a circumstance in determining the question as to whether Dutton rendered the services in the expectation of being compensated therefor. Again, it was alleged in the petition that a divorce had been granted. It was admitted in the answer, and its terms and conditions pleaded as a defense, and in a reply the plaintiff denied Dutton's knowledge of the terms and conditions of the decree. In view of all these facts and of the instruction of the court, we discover no error in the admission of the testimony.

On appeal of the plaintiff the judgment below is **AFFIRMED**. On appeal of the defendant the judgment below is **REVERSED**.

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COUNTY OF POWESHIEK, Appellant, v. JOHN H. PATTEN  
*et al.*, Appellees.

**Clerk of District Court: COMPENSATION: FEES IN PROBATE.** Under the provisions of section 16 of chapter 134, of Acts of the Twenty-first General Assembly, the clerk of the district court is not entitled to retain any part of the fees of his office in matters of probate and guardianship, except upon an allowance made by the board of supervisors, not exceeding the sum of three hundred dollars per year.

*Appeal from Poweshiek District Court.*—HON. A. R. DEWEY, Judge.

FRIDAY, OCTOBER 13, 1893.

THE plaintiff, John H. Patten, was clerk of the district court in the defendant county for the years 1887 and 1888, and the other defendants were sureties on his official bond. During each of those years he collected as probate fees the sum of three hundred dollars. An accurate account of such fees was kept in the clerk's

office, but not reported to the board of supervisors; nor did the board make any allowance as additional compensation to the clerk for either of those years until January, 1891, and after the defendant's term of office had expired, when it made an allowance of one hundred dollars for each of the years 1887 and 1888, and demanded of the defendant a return of the four hundred dollars of excess, which was refused, and this action is upon his bond to recover the amount. The district court, at the close of the evidence, directed a verdict for the defendant, and the plaintiff appeals.—*Reversed.*

*J. P. Lyman*, for appellant.

*J. W. Carr*, for appellee.

GRANGER, J.—A consideration of the case involves a construction of section 16, chapter 134, of Acts of the Twenty-first General Assembly, which is the act by which the judicial system of the state was changed, and some additional duties, in probate matters, devolved on the clerk of the district court. Prior to that act the following was the provision relative to the clerk's compensation for services in probate matters: "There shall be such compensation paid such clerk for his services in probate matters out of the fees collected by him for probate business as the board of supervisors may allow." Code, section 3781, provides for the compensation of the clerk by permitting him to charge specified fees for services. In section 3784 it is provided that "the total amount of compensation of such clerk for all official services shall not exceed the sum of eleven hundred dollars per annum, in counties having a population not exceeding ten thousand; the sum of thirteen hundred dollars per annum in counties having a population in excess of ten thousand, but not exceeding twenty thousand; and the sum of fifteen

hundred dollars per annum in counties having a population in excess of twenty thousand, but not exceeding thirty thousand. If the fees collected by the clerk in any county in any one year shall exceed the sum aforesaid, the excess shall be paid into the county treasury for the use of the county fund. In case the aggregate amount of fees so received by the clerk in any one year is less than the limit of his compensation as herein fixed, and such amount is deemed inadequate compensation by the board of supervisors, they may allow such additional amount as they may deem just and proper, within the limits herein prescribed." Section 16 of chapter 134, above referred to, is as follows: "From and after the first day of January, 1887, the clerk of the district court in each county, in addition to the compensation now allowed by law, shall be allowed to retain from fees collected by him in matters of probate and guardianship, such sum as may be fixed by the board of supervisors, not exceeding the sum of three hundred dollars per year; but such additional compensation shall in no case be allowed to be paid out of the county treasury." The chapter repeals "all acts and parts of acts" inconsistent therewith, and our view is that it repeals section 3783, so that the words of section 16, "in addition to the compensation now provided by law," refer to the provisions of Code, sections 3781, 3784. On this point there seems to be no dispute. Prior to the enactment of chapter 134, it will be observed that the law fixed the general compensation of the clerk, and then fixed a separate compensation "for his services in probate matters." Section 16, cited, drops the words "for his services in probate matters," and merely provides for adding to his compensation as clerk. It will be remembered that chapter 134 made numerous changes in the judicial system and in the duties of clerk, by abolishing the circuit court, of which the clerk of the district court was also clerk, and in

other particulars, in some respects lessening the duties, and in others increasing them. It is manifest that the intention was, in making the change, to no longer preserve a distinction as to compensation for probate service, but to consider such added duties with other changes, and then fix such additional compensation as justice required, and providing from whence the money should be derived; which is, as in other cases, from the fees of the court. The law fixes a limitation of compensation for all official services of the clerk, as will be seen in section 3784, and hence it can not be said that for probate services, there is to be any extra compensation. *Washington County v. Jones*, 45 Iowa, 260; *Moore v. Mahaska County*, 61 Iowa, 177.

The cause was tried below somewhat upon the theory that the main question was whether the clerk was absolutely entitled to compensation for such probate duties as were added by the provisions of chapter 134 of Acts of the Twenty-first General Assembly, or for all probate services rendered by him, and the district court adopted the latter view, and admitted proofs of the value of all such services, and excluded evidence offered in support of the other theory. It will be seen that we think neither theory is the correct one, but that, considering all services rendered, and all compensation received, it is for the board of supervisors to make such additional allowance as justice requires for services as clerk, observing at all times the limitations of the law. Until the board has made an allowance, we think the clerk is not entitled to retain any of the fees in probate, the presumption being, in the absence of an allowance, that full compensation for all service has otherwise been made. The language of the law is that he is entitled to retain from the fees "such sum as may be fixed" by the board. The law gives no right to retain from the fees until the amount is fixed.

There is some claim on the part of defendants of a

settlement, but it has no support in the record. The answer admits the retention of the fees, and with the view of the law as herein expressed upon the face of the pleadings there should be a judgment for the plaintiff for the four hundred dollars and interest, and the cause will be remanded for that purpose. REVERSED.

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CHARLES L. MULL & SONS, Appellants, v. JAMES DOOLEY, JR., *et al.*, Appellees.

1. **Chattel Mortgages: DELIVERY.** A debtor having agreed to execute a chattel mortgage to a creditor, and have the same recorded, the latter requested a notary to draft the mortgage, and leave it with the mortgagor. The amount to be secured was given to the notary, but nothing was said as to what property the mortgage was to cover. Before the mortgage was executed the mortgagee left for his home in another part of the state, and the mortgage remained in the hands of the notary for about three months, when it was handed to the mortgagor, who delivered it to the mortgagee, and it was then recorded. *Held*, that there was no delivery of the mortgage until it was received by the mortgagee.
2. ———: **WITHHOLDING FROM RECORD: FRAUD.** The mere failure to file a chattel mortgage for record will not render such mortgage fraudulent as against subsequent creditors, in the absence of any agreement or understanding between the mortgagor and mortgagee that the same should be so withheld for the purpose of enabling the mortgagor to obtain further credit.

*Appeal from Keokuk District Court.*—HON. A. R. DEWEY, Judge.

SATURDAY, OCTOBER 14, 1893.

ACTION to foreclose certain chattel mortgages. The facts are stated in the opinion of the court.—*Affirmed.*

*Mackey & Stockman*, for appellants.

*G. D. Woodin and Ed. Jackson*, for appellees,

89	312
91	360
89	312
96	106
99	453
89	312
110	109
89	312
130	285

KINNE, J.—The defendant Dooley was, in 1889, and up to January 7, 1890, in the business of merchandising at What Cheer, Iowa. Prior to October 1, 1889, he became indebted to appellee Gillfooy (his father-in-law) for money loaned. On October 1, 1889, it was agreed and understood between them that Dooley should secure his indebtedness to Gillfooy by executing a chattel mortgage. Dooley was to have said mortgage executed, and to file it for record. Gillfooy requested Beem, a notary public, to draft the mortgage, and leave it with Dooley after it was executed. Gillfooy told the notary the amount to be put in the note, but said nothing to either him or Dooley as to what property the mortgage was to cover. Prior to the execution of the note and mortgage, Gillfooy went to Monroe county, Iowa, where he was engaged in business until January 1, 1890, and had no knowledge until the latter date as to whether the note and mortgage had in fact been executed. Dooley did execute the note and mortgage before Beem on October 2, 1889, and was handed the mortgage by Beem. Dooley, however, failed to record the mortgage, and on January 1, 1890, handed it to Gillfooy, who filed it for record January 2, 1890. The note appears to have remained in Beem's hands until January 1, 1890. Prior to January 1, 1890, Gillfooy did not know that Dooley was in failing circumstances. The note was for eight hundred and one dollars and forty cents, and drew ten per cent. interest, and the mortgage covered all of Dooley's stock of goods, and further additions to same, and store fixtures, horses, wagons, and book accounts, then owned by him. January 6, 1890, Dooley executed and delivered to Mull & Sons a chattel mortgage on his stock of goods only, to secure two hundred and forty dollars and fifty-eight cents, with ten per cent. interest. At the time of taking this mortgage, Mull & Sons had actual as well as record notice of Gillfooy's mortgage. On the same day the

Spencer Company took a chattel mortgage from Dooley to secure four hundred and ninety-seven dollars and sixty-five cents, with ten per cent. interest. This mortgage covered the same stock as the others; also store fixtures and future acquired stock and fixtures; also small book accounts and notes, a wagon, a set of harness, and two horses. The last two mortgages were filed for record the day of their execution. January 7, 1890, Gillfoy and the Spencer Company seized the property covered by their mortgages, and attempted to foreclose by notice and sale. January 16, 1890, an injunction issued on a bill in equity filed by Mull & Sons, and the sale was restrained, and proceedings transferred to the district court. A receiver was appointed, and he took possession of, and sold, the stock of goods, store furniture, and fixtures. Under the issues as finally made in the district court all parties conceded that Baxter & Aldinger had a first lien for rent in the sum of eighty-nine dollars and forty-three cents on the fund in the receiver's hands. Mull & Sons claimed a first lien on said fund, subject only to the rent claim. Their claim is conceded by the Spencer Company. The Spencer Company claim a first lien on the proceeds of sale of the horses, harness, and wagon, and on proceeds of notes, accounts, and a county warrant collected, and a lien on the stock, subject to Mull & Sons and the rent claim only. The appellants' claim to priority is based on the failure to record the Gillfoy mortgage until January 2, 1890; also on a claim that such failure to record was the result of an agreement between Dooley and Gillfoy, entered into in order to aid Dooley in obtaining credit; that the appellants were misled thereby, and induced to sell the goods for which they are now seeking pay; that they had no actual notice or knowledge of the Gillfoy mortgage until January 6, 1890. The appellee claims his mortgage is a first lien on the property described therein, subject only

to the rent claim; that the mortgage, though made in October, 1889, was not in fact delivered until January 1, 1890; that it was given for a *bona fide* debt, and without fraud. The court found that Baxter & Aldinger were entitled to the first lien on the funds in the receiver's hands; that appellee's mortgage was a second lien on said funds, and that the fund was not sufficient to pay said claim in full; that the Spencer Company were entitled to have applied upon their claim the proceeds of sale of harness, the amount collected on the notes and accounts, and the county warrant. Judgments were rendered in each case.

I. The appellants contend that the Gillfooy mortgage was delivered when it was executed and handed to Dooley. We think the delivery took place on January 1, 1890, when the mortgagor handed the mortgage to Gillfooy. The

1. CHATTEL MORT-  
gages: deliv-  
ery.

question of delivery is always one of intention of the parties, to be gathered from all the facts and circumstances. Nor is the delivery completed without an acceptance on the part of the grantee. Now, to accept the benefit of an act done one must have knowledge that the act has been done, and approve of it. If, as in this case, Gillfooy did not know what property was to be mortgaged, and did not in fact know that the mortgage had been executed, how can it be claimed that he accepted the mortgage? In *Cobb v. Chase*, 54 Iowa, 253, the intervenor, Rhodes, was a creditor of Chase. It was agreed that Chase should execute to intervenor a chattel mortgage upon some stock, not specifically pointed out or agreed upon. In pursuance of the agreement, Chase, in the absence of the intervenor, executed to him a chattel mortgage upon some cows and steers, and filed the same for record. Afterward the plaintiff levied an attachment upon the mortgaged property, and after the levy the intervenor came into possession of the mortgage, though he knew before

that it had been made and recorded. It was held he could not hold the property as against the attaching creditor. The court said: "But the agreement in this case was merely that a mortgage should be given upon a certain kind of property. No one specific piece of property was agreed upon, nor even the quantity. The agreement, then, was far less definite than the mortgage, and being so, we do not see how it can be construed as equivalent to an acceptance of the mortgage." See *Day v. Griffith*, 15 Iowa, 104. We need not discuss the many cases cited by counsel touching this question of delivery, as in our view its decision is not material to a determination of the case.

II. If it be conceded that the Gillfooy mortgage was delivered when executed and handed to Dooley, and it was withheld from record until January 1, 1890, and that the appellants, without notice of its existence, extended credit to Dooley after its execution and prior to its being filed for record, which they would not have done had they known the goods were then mortgaged, and if meantime Dooley retained possession of the mortgaged goods, and disposed of them in the usual course of business, without accounting to the mortgagee therefor, still such facts alone would not render the Gillfooy mortgage fraudulent as against the appellants' mortgages. This court has never held that the mere withholding of a chattel mortgage from record would of itself render it fraudulent as to creditors who became such after the execution and before the filing of the mortgage. It is insisted that the case at bar is in its facts like *Goll & Frank Co. v. Miller*, 87 Iowa, 426. In that case the mortgage was kept from record, by agreement of the parties, for the purpose of enabling Miller to obtain further credit, and it was held that when credit had been extended under such circumstances the mortgagee would not be permitted to enforce his mortgage as

2. —: withhold-  
ing from rec-  
ord: fraud.

against those who had extended credit to the mortgagor. In the case at bar there is no evidence whatever that the Gillfooy mortgage was kept from record by virtue of an agreement or understanding had between the parties, or upon the suggestion or request of the mortgagor. We are not prepared to extend the rule, and hold that a mere failure to record a mortgage, under such circumstances as are disclosed in this case, will render it fraudulent as to creditors of the mortgagor.

In no event can the appellants recover. *First.* No delivery of the Gillfooy mortgage prior to January 1, 1890, is shown. *Second.* If the mortgage be regarded as delivered at its date, no agreement or understanding to withhold it from record has been established. The judgment of the district court is **AFFIRMED**.

89	317
134	265

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**WATERLOO WATER COMPANY, Appellant, v. H. B.  
HOXIE, Sheriff, et al., Appellees.**

**Equity: JURISDICTION:** INJUNCTION TO ENJOIN CONDEMNATION PROCEEDINGS. A court of equity will not entertain an action to enjoin proceedings to condemn land for railway purposes for the reason that the proceedings are unauthorized, because the land is already devoted to a public use, and it would be unlawful to condemn it, as such objection is available as a defense in the condemnation proceeding, and the party asserting it is thus afforded an adequate remedy at law. Whether an injunction will lie where the property holder would sustain an injury before the right to condemn could be determined in the condemnation proceeding, *quære*.

*Appeal from Black Hawk District Court.*—HON. D. J. LENEHAN, Judge.

SATURDAY, OCTOBER 14, 1893.

THE plaintiff is a corporation located and doing business in the city of Waterloo, Iowa, and was incorporated for the purpose of supplying said city with water for public and private purposes for a period of

twenty years, by virtue of a contract therewith. By ordinance of the city the plaintiff is permitted, and by its contract it is required, to provide and lay or place all necessary pipes, conduits, mains, and other necessary means to supply water for said city, and to supply and operate the necessary machinery for that purpose. To enable the plaintiff to thus perform its undertaking with the city it is provided by ordinance that it shall have the right to condemn and appropriate private property for the construction and operation of its works under the general laws of the state. In the performance of its contract the plaintiff purchased lot ten, in block six, in said city, and has located and constructed thereon its buildings, filters, pumps, engines, boilers, and other machinery necessary to furnish the city with water, has laid its mains in the city, and done all other things required of it in the performance of its contract. Of said lot ten there is a strip in the rear sixty feet in length, and thirty feet in width, not occupied by the buildings of the plaintiff. The unoccupied part of said lot is adjacent to the depot grounds of the defendant company, which company is about to institute proceedings to condemn a part of said strip or unoccupied land for the purpose of additional depot grounds, and for that purpose application has been made to the railway commissioners under the provisions of the law, and their report has been made to the effect that said land is necessary for additional depot grounds. The defendant Hoxie is sheriff of the county, and this proceeding is in equity to enjoin the defendants from proceeding to summon a jury to assess the damages under condemnation proceedings. A temporary writ of injunction was allowed, which was afterwards, on motion of the defendants, dissolved, and from the order dissolving the injunction the plaintiff appeals.—*Affirmed.*

*Mullen & Pickett* and *Gardner & McFadon*, for appellant.

*W. J. Knight* and *F. C. Platt*, for appellees.

GRANGER, J.—The motion to dissolve the injunction was tried upon affidavits in support of questions of fact tending to show the entire situation of the lot and the depot grounds, and the necessity for the plaintiff company to use the strip in question, at present, in the performance of its contract with the public, and also the probability of such use being required by the future growth of the city. The appellees insist that equity will not entertain the suit to determine the merits of the case presented, because the plaintiff has other available remedies to which it should resort, and among them it is urged that the proceeding which it seeks to enjoin affords such a remedy.

The particular ground upon which the aid of a court of equity is invoked is that the proceedings to condemn the land are unauthorized, because the land is already devoted to a public use, and, as we understand, that it would be unlawful to proceed to condemn it, even if needed by the railway company. The proposition is one in dispute between the parties, and is to be settled by adjudication. Could it be properly determined in the condemnation proceeding? It seems to us that the question is quite definitely answered in *K. & N. W. Ry Co. v. Donnell*, 77 Iowa, 221. The appellant insists that the case is not in point. In that case Donnell instituted the condemnation proceedings to recover the value of land taken by the company, and the company invoked the aid of a court of equity to restrain him from maintaining the proceedings because unauthorized, and a reason claimed why the action was not authorized was that the company, and not Donnell, was the owner of the land. Of course, if the

party seeking damage did not own the land, and the company did, the proceeding to condemn would not lie. That case, then, presented the question, is there anything that can legally be condemned. Now, to this case. Here it is said this land has once been appropriated to a public use, and it can not be again. It seems to us, clearly, that the question also arises here, is there anything that can legally be condemned. There is certainly nothing in the particular facts from which liability from condemnation is claimed in the two cases that should make a difference as to the tribunal that should determine them. In the *Donnell* case, other objections besides that of title were urged against the right to maintain the condemnation proceedings, making it indeed a strong and quite comprehensive case upon the question of what may be adjudicated in such a proceeding. Speaking of the question of title, and the facts relied upon, it is there said: "These matters could have been pleaded and established as a defense to the *ad quod damnum* proceedings commenced by the defendant. They present simple questions of title to the right of way, the plaintiff claiming that it owns the right of way; the defendants insisting that they have never parted with that right. Issues involving these facts and defenses, if established in the plaintiff's favor, would defeat the *ad quod damnum* proceeding." The same principle applies to the facts of this case. In this, the plaintiff claims that the strip of land has already been so appropriated to a public use as to be unavailable to the defendant company; the company insisting that it has not. The facts can as well be pleaded in the *ad quod damnum* proceeding as in this. If established, the law applicable to the facts can be as well applied to defeat the proceeding as in this case. In that case the court, after a further discussion of the question says: "From these considerations it appears that the district court, sitting in equity, had no juris-

diction of the case." Because of its being a jurisdictional question, it is further said that, without the objection being made in the answer, the court will raise it. The doctrine we assert has strong support in *High on Injunction*, section 644. It is there said: "Equity will not restrain a railway company from proceeding with an action, in a court of competent jurisdiction, to condemn lands for the use of its road upon grounds of objection, which are available and may be urged in the court in which the condemnation proceedings are pending, it being sufficient grounds for refusing to interfere by injunction in such a case that there is ample remedy at law." The text cites for its support *Railway Co. v. Patterson*, 37 Md. 125. In the same section it is further said: "Nor will a railway company be enjoined from prosecuting proceedings by condemnation to acquire title to real estate necessary for the purposes of its incorporation, in the exercise of the right of eminent domain, upon the ground of the unconstitutionality of the statutes authorizing such a right, when that matter can be passed upon and adjudicated in the condemnation proceedings themselves, before any injury can occur to the property holder." The latter words of the quotation might support a claim made by the appellant in argument, under a proper state of facts. It is urged that if the assessment is made by the sheriff's jury, and the amount thereof paid, the company can at once take possession of the strip, and occupy it, to the injury of the plaintiff, pending the litigation. Conceding that such a fact, if pleaded and shown, would justify the equity jurisdiction sought, which we do not decide, it is sufficient to say that it is in no way pleaded or made a basis of the action. From the record it does not appear that there are even grounds to apprehend such an injury. Our conclusion is that in the proceedings sought to be enjoined ample remedy will be afforded to protect the plaintiff against any unlawful appropriation

of the land, and that the injunction was properly dissolved. See, in support of the conclusion to a greater or less extent, *Central Iowa R'y Co. v. Moulton & A. R. Co.*, 57 Iowa, 249; *Stough v. Chic. & N. W. R'y Co.*, 71 Iowa, 641; *Kip v. Railroad*, 6 Hun, 24.

The order of the district court dissolving the injunction is **AFFIRMED**.

[89 322  
4112 168]

**S. R. MILLINGTON**, Appellee, v. **O. A. E. LAURER**,  
Appellant.

1. **Exemptions: PERSONAL EARNINGS OF ARTIST: VALUE OF MATERIALS USED.** The personal earnings of an artist for painting pictures are exempt from execution under section 3074 of the Code. A judgment of the district court holding such earnings exempt will not be disturbed upon appeal because the amount thereby secured to the debtor includes a nominal sum for the cost of materials.
2. ———: ———: **ASSIGNMENT: RIGHTS OF ASSIGNEE.** Under an assignment of the personal earnings of a debtor, made within ninety days from the time the services were rendered, the rights of the debtor under the statute, exempting such claim from execution or attachment, passes to the assignee, although the latter be a nonresident of the state.
3. ———: ———: ———: **RIGHT OF SET-OFF.** Such a claim is not subject in the hands of the assignee to a set-off for the amount of a judgment existing against the assignor at the time the assignment was made.

*Appeal from Buchanan District Court.*—**HON. D. J. LENEHAN**, Judge.

**SATURDAY, OCTOBER 14, 1893.**

**ACTION** to recover for the painting of two pictures. There was a trial by the court, and a judgment in favor of the plaintiff. The defendant appeals.—*Affirmed*.

*Woodward & Cook* and *E. E. Hasner*, for appellant.

*H. W. Holman*, for appellee.

ROBINSON, C. J.—In March, April and May, 1891, F. C. Merrill painted for the defendant two pictures at the agreed price of one hundred dollars. On the ninth day of June, 1891, Merrill assigned his account for the painting to the plaintiff, a nonresident of this state. In the year 1873 one Mason recovered in the circuit court of Buchanan county a judgment against Merrill for the sum of one hundred and forty-two dollars and ten cents and interest thereon at ten per cent. per annum, and six dollars and sixty cents costs. That judgment is unpaid. It was assigned to James Dalton, and by him assigned to the defendant in December, 1886. The defendant admits that Merrill painted for him the pictures for the price stated, but claims that by agreement between them the price was to be applied in paying the judgment, and avers that he has always been, and is now, ready to so apply it. He also pleads the judgment by way of counterclaim, and alleges that he owned it at the time the claim for the painting was assigned to the plaintiff. The plaintiff denies that there was any agreement to apply the price of the painting on the judgment, and alleges that the price was the personal earnings of Merrill, exempt to him from execution, for the reason that he was the head of a family, and a resident of this state when the painting was done, and that the claim therefor was assigned to the plaintiff within ninety days from the time it was earned. The district court rendered judgment in favor of the plaintiff for one hundred dollars, with interest and costs.

I. Section 2546 of the Code is as follows: "In case of the assignment of a thing in action, the action by the assignee shall be without prejudice to any counterclaim, defense or cause of action, whether matured or not, if matured when pleaded, existing in favor of the defendant and against the assignment." Under this provision, any defense which the defendant had to the

1. EXEMPTIONS:  
personal earnings of artist:  
value of materials used.

claim in controversy while it was owned by Merrill is available against the plaintiff. Merrill denied the alleged agreement with the defendant to apply the price of the pictures on the judgment, and the district court was authorized to find that no agreement of that kind was made.

We are required to determine whether the evidence justified the district court in finding that the judgment against Merrill, owned by the defendant, was not a defense to the claim in suit when it was assigned to the plaintiff. Section 3074 of the Code provides that the earnings of a debtor, who is a resident of this state and the head of a family, "for his personal services, or those of his family at any time within ninety days next preceding the levy, are \* \* \* exempt from execution and attachment." Merrill was a resident of this state, and the head of a family, when the pictures were painted, and also when the claim for their price was assigned. It is said by the appellant that the price of the pictures was not due for the personal services of Merrill, because his agreement required him to furnish the canvas, paints, and other materials which were used in producing the pictures. The evidence shows that the cost of all the materials used for that purpose was about one dollar and a half, or little more than nominal. It was so insignificant that we would not interfere with the action of the district court in holding in effect that for the purposes of this case the amount due for the pictures was due for the personal services of Merrill. The statute does not distinguish between the earnings of an artist, a mechanic or a common laborer, but exempts them alike, when other conditions essential to the exemption exist. *McCoy v. Cornell*, 40 Iowa, 458.

Since the amount in controversy was due for the personal services of Merrill, he had the right to transfer the claim for it, and the exemption from seizure for

the payment of his debts passed with it to his assignee. *Waugh v. Bridgeford*, 69 Iowa, 335; *Pearson v. Quist*, 79 Iowa, 54. The fact that the assignee was a nonresident of this state is wholly immaterial. The exemption was for the benefit of the debtor's family, and to hold, when exempt property is transferred, it becomes subject, in the hands of the assignee, to the payment of the assignor's debts, would in many cases destroy the value of the exemption by preventing the family of the debtor from deriving any benefit from it. The district court was authorized to find that the assignment in this case was made within ninety days from the time when the money was earned.

II. The remaining question to be determined, and the one of chief importance, is whether the judgment owned by the defendant constituted a defense to the claim of Merrill at the time it was assigned to the plaintiff. If it did, the plaintiff took the claim subject to that defense, and, as it is less than the amount due on the judgment at the time of the assignment, the defendant should succeed. The determination of the question depends upon the proper construction to be given our statute. It is the well established rule, in this and most other states, that laws exempting the property of debtors from seizure for the payment of their debts are to be liberally construed, to the end that the purpose for which they were enacted may be accomplished. *Reynolds v. Haines*, 83 Iowa, 342. It has been held, in an action by the debtor to recover of his judgment creditor for exempt property which was taken on execution to satisfy the judgment, that the judgment creditor can not set off his judgment against the claim of the debtor for such property, on the ground that to allow such an offset would in most cases result in a palpable evasion of the law. *Wilson v. McElroy*, 32 Pa. St. 82; *Thompson on Homestead & Exemption*,

2. —: —:  
assignment:  
rights of  
assignee.

section 893; *Curlee v. Thomas*, 74 N. C. 51. In *Howard v. Tandy*, 15 S. W. Rep. (Tex. Sup.) 578, it was held that money in the hands of the sheriff, which had been realized for damages caused by the seizure and sale of exempt property under an execution against the owner of the property, could not be applied on an execution against such owner, in favor of the judgment creditor against whom he had obtained the judgment for damages. It was said that to permit such an application would in effect render nugatory the exemption laws of the state. In *Below v. Robbins*, 45 N. W. Rep. (Wis.) 416, it was held that a judgment for the wrongful conversion of property exempt from sale under execution was likewise exempt. In *Collier v. Murphy*, 16 S. W. Rep. (Tenn.) 465, it was held, that a judgment could not be set off in an action brought by the judgment debtor for wages due him which were exempt from execution, attachment and garnishment. It was said that the language of the statute which created the exemption, strictly construed, would protect the wages only from "execution, attachment or garnishment," yet the whole spirit of the act was such that it was intended to protect the wages from all manner of legal seizure. A statute of Nebraska exempts the wages of certain persons "from the operation of attachment, execution and garnishment process" for sixty days. It was held under that statute that, in an action for wages protected by it, an indebtedness from the employee to the employer, which existed and was due and payable before the wages were earned, could not be set off against them. *Deering & Co. v. Ruffner*, 32 Neb. 845, 49 N. W. Rep. 771. Some of the cases cited arose under statutes which were the same in legal effect, so far as they relate to the question under consideration, as the statute of this state, and all will serve to illustrate the rules of interpretation which are commonly applied to

statutes exempting property of debtors from seizure for the payment of their debts. Section 3072 of the Code exempts from execution in certain cases the books and instruments of a physician. It was held in *Reynolds v. Haines*, 83 Iowa, 342, that the money due under a policy of insurance for such books and instruments which had been destroyed was also exempt. Where there is no special declaration to the contrary, the homestead of every family, whether owned by the husband or wife, is exempt from judicial sale. Code, section 1988. It has been held that, where a portion of a homestead is taken by judicial process for the right of way of a railway, the value thereof paid by the railway company is exempt from execution, at least for a reasonable time. *Kaiser v. Seaton*, 62 Iowa, 463; *Mudge v. Lanning*, 68 Iowa, 641. It will be noticed that the interpretation given to the statute is not in all cases the one which a literal following of its provisions would seem to require, but force and effect are sought to be given to the obvious legislative intent. It is clear that the money due to Merrill could not have been appropriated under an execution or attachment issued against his property. That is conceded, and is according to the letter of the statute. But the primary object of the statute is, not merely to protect the earnings of the debtor from seizure by means of the processes technically known as "attachment" and "execution," but to preserve them for the benefit of his family against any appropriation for the payment of his debts not authorized by law to which he does not consent. It was said in *Banks v. Rodenbach*, 54 Iowa, 695, that an employer can not purchase claims against a laborer, and set them off against his earnings.

It is claimed by the appellant in this case that he gave to Merrill the contract for the painting because he owned the judgment, and adopted that method of collecting a part of it. But Merrill did not assent to

that plan, and claims that he knew nothing of it, but supposed, when the agreement was made and the work was done, that the judgment was owned by Dalton. The defendant could not have appropriated the money in controversy by means of an execution, the ordinary method of enforcing a judgment, but seeks to accomplish what he is prohibited from doing directly by indirect means. This the law will not permit. We conclude that the judgment of the district court is right, and it is, therefore, **AFFIRMED**.

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**MICHAEL HORAN, by his next Friend, Appellee, v.  
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA  
RAILWAY COMPANY, Appellant.**

1. **Personal Injury: CONTRIBUTORY NEGLIGENCE: EVIDENCE.** In an action by a brakeman to recover for injuries received while in the act of coupling cars on the defendant's road, it appeared that the earth between the ties, at the point where the coupling was done, had been washed out to such an extent as to interfere with the duties of a brakeman at that point. The coupling was made in the nighttime, the conductor was not familiar with the condition of the road, and it was necessary that he act with promptness in order to make the coupling, or allow the engine and car to come together, and then make an opening, so that he could go in slowly and do the work. *Held*, that the circumstances justified the brakeman in making the coupling while the cars were moving, and that he was not guilty of contributory negligence for so doing.
2. ———: **NEGLIGENCE: EVIDENCE: LOCATION OF ACCIDENT.** In such case it was proper to locate the place of the injury by the testimony of the brakeman that the coupling was made "in the yards of the defendant."
3. ———: ———: ———: **TESTIMONY NOT RESPONSIVE.** The admission of testimony which is not responsive to questions asked a witness will not be deemed prejudicial when the facts testified to are relevant and have been previously given in evidence in answer to proper questions.
4. ———: ———: ———: **CONCLUSIONS.** The testimony of the brakeman in such case that the cause of his hand getting caught was "by the defect being in the road, and slipping off the tie," is not objectionable as the statement of a conclusion.

5. ———: CONTRIBUTORY NEGLIGENCE: RULES OF RAILROAD COMPANY DISREGARDED BY EMPLOYEE: WAIVER. The coupling in question was made by hand, contrary to a rule of the defendant that prohibited coupling by hand; and a coupling stick furnished by the defendant, and which said rule required should be used in making couplings, was returned by the brakeman to the agents of defendant from whom the same was received. *Held*, that it was properly left to the jury to determine whether the failure to use the coupling stick was the proximate cause of the injury, and that if the jury found that it was not, then the brakeman was not chargeable with contributory negligence because of the violation of the above rule.
6. ———: ———: EVIDENCE. In such case it was proper to permit the brakeman to describe to the jury the position he would have occupied if he had used the stick in making the coupling.

*Appeal from Woodbury District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

SATURDAY, OCTOBER 14, 1893.

THE plaintiff was employed upon the defendant's railroad as a brakeman. While coupling a flat car to a locomotive engine at Alton, in this state, his right hand was caught between the drawbars, and his hand was so crushed as that it became necessary to amputate the thumb and forefinger. He claims that the injury was received by reason of the defective condition of the railroad track at the place where he attempted to make the coupling. The defendant resisted the claim on the ground that the railroad track was not defective and out of repair, and that the defendant is not liable, because the plaintiff violated a rule of the company in attempting to make the coupling without the use of a stick to guide the link into the opening, and that he thereby contributed to the injury by his own negligence. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff for four thousand dollars. The defendant appeals.—*Affirmed*.

*Swan, Lawrence & Swan*, for appellant.

*F. E. Gill and Lynn & Sullivan*, for appellee.

ROTHROCK, J.—I. There is some controversy as to the question whether the railroad track was out of repair, and there is a conflict in the evidence in relation thereto. The injury was received at a point on the road where the business of the company required coupling of cars to be frequently made. The exact point where the plaintiff was required to make the coupling was nearly opposite to a water tank used to supply engines with water. The jury were fully warranted in finding that the earth between the ties was washed out, so that the filling or surfacing of the road was gone to such an extent as to interfere with the duties of a brakeman in making couplings at that point. The coupling was attempted to be made in the night, and the plaintiff carried a lantern, and the movement of the engine and the plaintiff's other duties were such that, when he arrived at the place where the coupling was to be made, it was necessary that he should act with promptness in order to make the coupling, or to allow the engine and car to come together, and then make an opening, so that he could go in slowly and do the work; and the plaintiff was not familiar with the exact condition of the track at that point. In view of these facts, we think the jury were fully warranted in finding that the circumstances surrounding the plaintiff were such that, acting as he was, in an emergency, he was not chargeable with contributory negligence in going between the cars when he did, and attempting to make the coupling.

II. In the course of the trial, counsel for the defendant made a number of objections to evidence, and took exceptions to the rulings of the court thereon. It was objected that the plaintiff was permitted to state as a witness that the coupling was attempted to be made "in the yards of the defendant." It is claimed

1. PERSONAL injury. contributory negligence: evidence.

2. —: negligence: evidence: location of accident.

that this is a mere conclusion of the witness. We think the evidence was competent. It was no more than locating the place of the injury. It is always allowable for a witness to state that an occurrence took place at a particular place, as in a certain town or village. But even if it be thought that the evidence was technically a conclusion, rather than a fact, it was without prejudice, because in the same connection the witness stated that switching and coupling was done at, and near, that place. The only object of the evidence was to show that the coupling was not required to be made at an unusual place, and that fact appears from all the evidence on that point, and it was wholly immaterial whether it was within the limits of the yards.

III. The plaintiff was asked if he looked, as he usually did, when he went in to make a coupling. The answer was, "Oh, no; I did not have time to look." The defendant moved to strike out the last part of the answer as not responsive. In reply to the motion the court remarked: "It is not responsive, but you can cross-examine him about it without asking any other question." The ruling was without prejudice. It was the right of the plaintiff as a witness to state fully all facts in connection with the transaction, whether he looked at the track, or whether he had time to examine it and make the coupling. He did give all these facts in answer to proper questions, and it was wholly immaterial whether the answer to this particular question was responsive or not."

IV. The plaintiff was asked what caused him to get his hand caught. This question was objected to as calling for a conclusion. In response to the objection, the court said: "He may state the facts." The answer was: "By the defect being in the road, and slipping off the tie." The answer was objected to as not stating facts, but the

3. —: —: —: testimony not responsive.

4. —: —: —: conclusions.

conclusion of the witness. The court, in response to this objection, said: "As far as it is a conclusion, the jury will find for themselves what the case is. The direction of the court was that he should state the facts as they occurred, rather than his opinion." The witness was then asked whether he slipped off the tie or not, and where his foot went to. This question was objected to as leading, and not calling for a statement of facts. The objection was overruled, and the witness answered: "Yes, sir; my foot slipped off the tie in between and down to the bottom of the defect." All of this evidence, as to the manner of receiving the injury, had been fully detailed by the witness to the jury. He had described how he had gone in to make the coupling, and how he held his lantern, how his feet were placed, and how his position was changed by slipping off a tie into the depression, and how his hand came between the drawbars, and was caught because he slipped off the tie. This line of evidence, which was objected to, was probably unnecessary, because it was mere repetition of what the witness had before stated, and the statement that the injury was received because he slipped off the tie, was no more the conclusion of the witness than it would be for one who was injured by a fall to state that fact.

V. We come now to the material question in the case. The plaintiff was employed by the defendant as brakeman on the fifteenth day of August,

5. —: contributory negligence: rules of railroad company disregarded by employee: waiver.

1890, at which time a circular containing a number of rules was presented to him, and the receipt thereof was acknowledged in the following words: "I hereby acknowledge receipt of a printed copy of the above circular, which I have compared, and found to be a true copy, and state that I am over twenty-one years old. [Signed] Michael Horan, Brakeman." One of said rules contained the following language: "Great care must be exercised

by all persons when coupling cars. Inasmuch as the coupling apparatus of cars, or of engines, can not be uniform in style, size, or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms or persons of those engaged in coupling, all employees are enjoined, before coupling cars or engines, to examine so as to know the kind and condition of the drawheads, draw-bars, links, and coupling apparatus, and are prohibited from placing in the train any car with a defective coupling, or brake, until they have first reported its defective condition to the yard master or conductor. Sufficient time is allowed and may be taken by employees, in all cases, to make the examination required. Coupling by hand is strictly prohibited. Use for guiding the link a stick or pin, which will be furnished on application to the division superintendent, train or yard master. Each person having to make couplings is required to provide himself with a proper implement for the purpose as above specified." Another clause of said rules was as follows: "The company will not be responsible for any injury suffered by any employee who shall couple cars by hand. Any employee who neglects or refuses to use the stick in coupling cars takes upon himself all risks of injury arising therefrom. The attention of employees is again called to the above rule because it is understood that some of them are neglecting to use the stick furnished by the company. During the past year more employees were injured in coupling and uncoupling cars than from all other causes combined. Most of these injuries could have been avoided by using the stick, or by obeying the rules of the company as to coupling or uncoupling cars in motion."

It appears from the evidence that, immediately after signing the receipt of the rules and the delivery of the coupling stick, the plaintiff at once returned the stick and his copy of the rules to the office from which

he received them, and that he did not at any time use that or any other stick in making couplings. The defendant claimed in the court below, and claims here, that this was a reasonable rule; and that, under the facts, it was the duty of the court to instruct the jury that the rule was reasonable; and that, if the violation of it contributed proximately to produce the injury, there could be no recovery; but that, if the violation of the rule did not contribute to produce the injury, then the fact of its violation would not excuse the defendant from negligence, if there was negligence in keeping its track in proper repair. In other words, the court submitted to the jury the fact whether the violation of the rule should be regarded as contributory negligence. The plaintiff, in a reply filed to the answer, averred that the rule requiring brakeman to use a stick in making couplings was waived by the defendant. There is evidence in the record which to some extent sustains this averment. The very fact that the plaintiff returned the stick to the office immediately after receiving it, and never used that or any other stick, is evidence tending to show that it was not expected that the rule would be observed. Indeed, it is a matter of so much notoriety that car couplings are made by hand that it may become a question whether the rule requiring coupling sticks ought to be held to be obligatory upon switchmen and brakemen. However that may be, and although it may be conceded that the rule was in force, and should have been obeyed, yet the plaintiff ought not to be denied recovery if the failure to use the stick did not contribute to produce the injury. In view of the evidence in the case, that question was a proper subject for the consideration of the jury. That is the rule adopted by this court (*Reed v. B., C. R. & N. R'y Co.*, 72 Iowa, 170), and, in view of what is a matter of common knowledge as to how generally this rule is disregarded, the law of the cited case is just, and should

be adhered to. It amounts to just this: that, if a brakeman who is injured by coupling with his hands can satisfy a jury, by a preponderance of the evidence, that the injury would have been received just the same if he had used the stick furnished to him by the defendant, he ought not to be chargeable with contributory negligence. It was upon this theory that this case was submitted to the jury, and, as we read the evidence, the finding that the injury would have occurred if the plaintiff had kept the stick, and attempted to use it in making this coupling, is fairly supported by the evidence. We can not detail the evidence upon which we base this conclusion. Indeed, it can not be reproduced here.

VI. The record shows that the witnesses illustrated their evidence to the jury by posture and description, and by motion of the hands descriptive of the position of the plaintiff at the time and place of receiving the injury. It is claimed that it was error to permit the plaintiff to describe to the jury the position he would have been in if he had used the stick. There was no error in admitting this line of evidence. It is said this is only a supposition or conjecture or a conclusion of the witness. We think that when the witness described the stick, and how it must be held, and how he stood with reference to the place of danger, and the alleged defective condition of the roadbed, he was detailing facts, material to be considered in determining whether the failure to use the stick contributed to produce the injury.

The judgment of the district court is **AFFIRMED**.

A. F. B. PORTMAN, Appellant, v. CITY OF DECORAH,  
Appellee.

**Personal Injury; CONTRIBUTORY NEGLIGENCE; PROXIMATE CAUSE.** A party can not recover for a personal injury sustained through the negligence of another, if his own negligence has contributed to the injury, although the injury might have been avoided, if the party causing the same had exercised ordinary care.

*Appeal from Winnesheik District Court.*—HON. W. A. HOYT, Judge.

SATURDAY, OCTOBER 14, 1893.

ACTION to recover for personal injuries alleged to have been sustained in consequence of the negligence of the defendant in not maintaining suitable rails or guards at a certain dangerous place in one of its streets, sufficient to prevent foot passengers from falling into said dangerous place. It is sufficient to say of the answer, that the defendant denied each allegation of negligence on its part, and denied that the plaintiff was injured without fault or negligence on his part. The cause was tried to the court, and certain findings of facts and conclusions of law made and filed. The court found, among other facts, that the plaintiff "was guilty of negligence, which contributed to his said accident and injury," and, as a conclusion of law, "that plaintiff is not entitled to recover in this action; and that defendant is entitled to judgment for costs against plaintiff." Judgment was rendered against the plaintiff, from which he appeals.—*Affirmed.*

G. W. Adams, L. Bullis, and R. F. B. Portman,  
for appellant.

G. R. Willett and E. P. Johnson, for appellee.

GIVEN, J.—The controlling question presented on this appeal is whether the court erred in finding as stated above. While the court did not find specifically that the defendant was guilty of negligence as charged, we are warranted in assuming from the record, for the purposes of the question before us, that the defendant was negligent as charged. The appellant contends that, to defeat recovery, his negligence must have been the proximate cause of his injury; that, if the fact of his negligence could have been avoided by ordinary care on the part of the defendant, it was not the proximate cause of the injury. Appellant cites Whittaker's Smith on Negligence, 373, and Shearman & Redfield on Negligence, section 61. That the contributory negligence to defeat recovery must be a proximate cause of the injury, as distinguished from remote cause, is not questioned, but it is certainly clear that there may be more than one proximate cause. That which is relied upon in the authorities mentioned is said in connection with the discussion of the doctrine of comparative negligence and the burden of proof. It is well settled in this state that the doctrine of comparative negligence does not obtain, and that the burden is upon the plaintiff to show himself free from negligence directly contributing to cause the injury complained of. In *McKelvy v. B., C. R. & N. Ry Co.*, this court, in speaking of contributory negligence, says: "Such negligence, strictly speaking, is negligence that operates with other negligence in producing a result." It has been uniformly held by this court that where a party, by his own negligence or carelessness, has contributed to produce the injury complained of, he can not recover. *Wright v. Ill. & Miss. Telegraph Co.*, 20 Iowa, 195; *Haley v. Chi. & N. W. Railway Co.*, 21 Iowa, 15; *Sherman v. Western Stage Co.*, 24 Iowa, 515. For other cases, see Digest. In *Hamilton v. Des M. Valley*

*Railway Co.*, 36 Iowa, 31, it is held that where there was mutual negligence, and the negligence of each party was a proximate cause of the injury, no action could be maintained by the party injured. The rule that negligence on the part of the injured party which directly contributes to his injury will defeat recovery, even though the other party is also negligent, has been so frequently announced by this court as not to require further citations. We have examined the evidence with care to determine whether the finding of the court that the plaintiff was negligent is supported thereby. It would consume space unnecessarily to here set out and discuss the evidence. It is sufficient to say that our examination of it leads us to the conclusion that the finding of the court on this question of fact has ample support. We think the judgment of the district court should be AFFIRMED.

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MARY SMITH, Appellant, v. GEORGE YOUNG *et al.*,  
Appellees.

**Title by Adverse Possession :** COLOR OF TITLE: LIFE ESTATE INSUFFICIENT. Where a widow having a life estate only in an undivided one third of certain real estate, conveyed her interest to C., who conveyed to B., and the latter afterwards quitclaimed his interest to the widow, who thereafter remained in possession of the property for more than ten years, but in conjunction with one of her children, who lived with his mother during his minority, and after attaining his majority built a house upon a part of the property, and occupied the same with his family, *held*, that the widow's possession was neither exclusive nor adverse, so as to give her title by adverse possession.

89	338
97	250
89	338
116	52

89	338
119	237
89	338
122	313

89	338
142	235

died intestate, seized of said lot, in 1844, leaving surviving him his widow, Sally Ann Young, and five children. There was never an administration upon his estate, nor was dower ever assigned. At the time of his decease the dower of the widow was a life estate of one third. On the fifth day of May, 1846, the widow conveyed her interest in the lot to one Conet, and on the same day Conet conveyed his interest to one Ball. On the nineteenth day of June, 1846, Ball conveyed it to the widow again. The words of the deed from Ball are: "I do grant, bargain, and sell, and forever quitclaim." From the death of her husband, in 1844, to the conveyance by her to Ball, the widow occupied the lot in question, and after the conveyance to her by Ball she occupied it continuously till near her death, in February, 1889, except for the years 1852 and 1853, during which years she, having married one Howell, lived with him in St. Paul. Howell died in December, 1853, when she returned to Dubuque, and resided on the lot. During nearly all of the time after the death of Joseph Young, his children, one or more of them, occupied the lot with the widow, either by occupying the house with her or another house on the lot. William Young, one of the defendants, built a house on the lot in 1867, and has lived there since. By her marriage to Howell she had one daughter, who is the plaintiff in this suit. On the tenth day of November, 1888, Mrs. Howell conveyed the lot to the plaintiff, by warranty deed, and she brings this suit against the heirs of Joseph Young to quiet the title to the lot in her. The district court made the following findings: "Sally Ann Young had a life estate in one third of the premises in dispute, and that alone. The deed from

The deed from Mrs. Young to the plaintiff conveyed Mrs. Young's life estate, and no more, and this estate terminated with the death of Mrs. Young. Mrs. Young's possession was neither exclusive nor adverse, in such sense as to furnish her a title based thereon." From a judgment dismissing her petition the plaintiff appeals.—*Affirmed.*

*Monroe M. Cady*, for appellant.

*P. S. Webster*, for appellees.

GRANGER, J.—The legal proposition involved in this case is not difficult. The appellant claims title to the lot only because of adverse possession by her mother or grantor. Had her mother never conveyed to Conet, but continued to occupy the lot, there would have been neither color of title nor claim of right on which to base title by adverse possession. Her interest of a life estate would have given no color to title in her behalf. It would have defined her right as being one of occupancy and use, without title or ownership, and there could be no claim of right, except as pertained to the life estate. She knew that she had nothing, except her life estate, to convey to Conet, nor did her deed purport to convey more. She knew Conet had nothing more to convey to Ball; nor had Ball anything more to convey to her. She could not have been mistaken that she received back nothing more than she gave, and she gave no title whatever. Conceding that to one not possessed of the actual facts the conveyances would have constituted a color of title or claim of right, as a basis for the operation of the statute of limitations, so as to justify a title by adverse possession, no such a rule obtains in favor of one actually knowing that he or she has no title or claim. The adverse possession must be in good faith. *Close v. Samm*, 27 Iowa, 503. It is true that title by adverse possession

may be obtained under a claim of title or right that is invalid, but not when the claimant actually knows that he has no title or right to a title. The joint occupancy of the lot forbids the idea of adverse possession.

William Young, while a minor, lived with his mother on the lot when she lived there, and after obtaining his majority he married, built a house on the lot, and has resided there since, and is now in possession of it. The district court found that the possession by Mrs. Young was neither adverse nor exclusive, both of which are essential to the title claimed, as against joint tenants. *Flock v. Wyatt*, 49 Iowa, 466. The possession of the widow must have been exclusive to justify an inference of an ouster as to joint occupants, and permit the statute of limitations to run. *Burns v. Byrne*, 45 Iowa, 285.

There is a claim by the appellant that when the widow took possession, under the deed from Ball, it was not by virtue of her dower right, for, as there was no assignment of dower, her right to such possession expired with the period of quarantine, forty days from the death of her husband, and that her possession by virtue of her deed, even though her grantor possessed no title, made her a trespasser, by reason of which her "possession was from the instant of her entry adverse to the defendants." The situation would be the same had she not conveyed the lot, but continued to occupy it beyond the period of quarantine. It is said that such an occupancy would have been a trespass; but the trespass in either case would not oust or dispossess her joint tenants, and without that her possession would not be adverse to either. See *Whalley v. Small*, 29 Iowa, 288. Some reliance is placed upon the case of *Hogan v. Kurtz*, 94 U. S. 773. It was an action of ejectment, and involved the application of the statute of limitations, because of adverse possession by a widow. There were no children. Her occupancy, with that of

her devisee, was for forty-two years. By the law then in force, where there were no decedents or kindred to take the estate, the title passed to the husband or wife, as the case might be. As we understand, the claim of title in that case was upon the state of facts; that is, it was a claim of title based on the absence of the defendants or kindred to take the estate. It will be seen that the two cases are widely different. It is not important to consider the case further. We think the conclusions of the district court are right, and its judgment is **AFFIRMED**.

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DENNIS MAGIRL, SR., Appellee, v. DENNIS R.  
MAGIRL *et al.*, Appellees, and G. H.  
ODELL, Sheriff, Appellant.

1. **Chattel Mortgage: DESCRIPTION OF INDEBTEDNESS INDEFINITE: FRAUD.** An indefinite statement in a chattel mortgage, as to the amount of the indebtedness intended to be secured thereby, when the facts relating to the indebtedness are within the knowledge of the parties, is not in itself such evidence of intentional concealment as will render the mortgage fraudulent.
2. ———: ———: ———. A chattel mortgage conditioned that the mortgagor shall save and protect the mortgagee "from the payment of any and all debts which he has obligated himself to pay" on the mortgagor's account, "as surety in fact or otherwise" for said mortgagor, is not so indefinite in its description of the indebtedness as to render the mortgage void as to the creditors of the mortgagor.

*Appeal from Delaware District Court.*—HON. D. J.  
LENEHAN, Judge.

SATURDAY, OCTOBER 14, 1893.

ACTION in equity to enjoin the defendant sheriff from selling certain mortgaged personal property, and asking for the foreclosure of a real estate mortgage, also of a chattel mortgage. There was a demurrer to the petition, which was overruled, and the defendant sheriff appeals.—*Affirmed*.

*Yoran & Arnold*, for appellant.

*Bronson & Carr*, for appellee.

KINNE, J.—The defendant, Dennis R. Magirl, on November 3, 1890, executed to the plaintiff his certain mortgage upon real estate therein described. Said mortgage was filed for record on the same day. On the same day the defendant executed and filed for record a chattel mortgage on certain property to plaintiff. Each mortgage expressed a consideration of one dollar. The chattel mortgage contained the following provision: "To be void on condition that the said Dennis R. Magirl shall pay or cause to be paid all debts and liabilities that have been secured for him by said second party (plaintiff), and save and protect said second party from the payment of any and all debts which he has obligated himself to pay on first party's account, as surety in fact or otherwise for first party." The real estate mortgage contained a like provision. The petition avers that in fact the plaintiff had, prior to the execution of the mortgage, obligated himself to pay, as surety or otherwise for the defendant, certain notes, which are set out, and on which there is due more than three thousand dollars; that the mortgages were taken to secure the plaintiff against loss on account of his signing said notes, and obligating himself for the payment of the same; that the defendant sheriff, on April 4, 1891, and by virtue of two executions, issued out of the office of the clerk of Delaware county, Iowa, levied on the property, real and personal, covered by said mortgage, to satisfy certain judgments rendered against the defendant, Magirl. It is also averred that notice was on May 9, 1891, served upon the sheriff, informing him of the several sums still unpaid, and for which said mortgages were given as security, and claiming a lien on said property,

the right of possession of the same, and the release of said levies; after which the said sheriff released the real estate from said levies, and refused to release the personal property; that said sheriff had actual notice, when he made the levy on said personal property, of the existence of the said mortgage lien thereon; that said levy was wrongful. Other necessary allegations were made for the issuance of an injunction. It was prayed that the lien of the plaintiff's mortgages be decreed first, and that they be foreclosed; that an injunction issue restraining said execution sales; that the liens be decreed void, etc. An injunction issued as prayed. The defendant sheriff demurred to the petition on the ground that the facts stated did not entitle the plaintiff to the relief demanded. The sheriff alone appeals.

I. It is insisted that the parties to this mortgage must have known all the facts touching the indebtedness sought to be secured thereby, and that, by intentionally withholding them, they have been guilty of such concealment as amounts to a legal fraud, vitiating the instrument, so far as creditors are concerned. We do not think such a result necessarily follows. Even if it be conceded that the facts relating to the indebtedness were within the knowledge of the parties, there may have been no intentional concealment of them, even though they were not fully set out. It occurs to us that whether or not the mere failure to fully describe the debt would amount to a fraud would depend upon circumstances to be disclosed by the evidence; it is a question of fact. Doubtless there might be a case where such failure to fully describe the debt might be strong evidence of fraud, but this description, on its face, is not of such a character as to render the mortgage fraudulent.

1. CHATTEL mortgage: description of indebtedness indefinite: fraud.

II. It is contended that the description of the debt was so indefinite as not to put creditors upon inquiry. We have already set out the conditions of the mortgage in this respect.

It may be conceded that the better and safer practice is to specifically set out or to describe the indebtedness sought to be secured; yet the failure to do so does not of necessity render the mortgage of no effect as to creditors of the mortgagor. As is said by DEWEY, J., in *Henshaw v. Sumner*, 23 Pick. 446, the use of a chattel mortgage "as indemnity for liabilities as sureties and indorsers must necessarily exclude the idea of great precision in the exact amount of the incumbrance being made apparent on the face of the mortgage. There must be a sufficient general description to embrace the demands and liabilities intended to be secured, and to put the person examining the record upon inquiry, and to direct him to the proper source for more minute and particular information of the amount of the incumbrance." *Carter v. Rewey*, 62 Wis. 552, 22 N. W. Rep. 129. It is said in *Fetes v. O'Laughlin*, 62 Iowa, 533, "The amount of the debt need not be shown upon the face of the mortgage if reference be made to other evidence thereof from which the true amount of the debt may be determined." So it is said: "When the description of the debt is sufficient to direct a person to the source for information as to the amount of the incumbrance, the mortgage will not be held void on the ground of uncertainty in the description of the demand or liability intended to be included." Jones on Chattel Mortgages, section 86. In *Michigan Ins. Co. v. Brown*, 11 Mich. 265, the condition in the mortgage was for the payment of "all sums of money now due, or hereafter to become due." It was contended in that case that the mortgage was invalid on account of insufficient description. The court said: "The only question presented is whether a mortgage to secure all

debts existing is good without specifying them. Upon review of the cases which were cited in the argument, we are satisfied that there is no legal objection to such a mortgage. It affords the means of ascertaining by inquiry the amount claimed to be due at any time. The objection that a limit of liability should appear is more specious than sound. Such a limitation will always be made large enough to cover all contingencies, and leaves it still necessary to make inquiry to learn the real amount secured; and, so far as opportunities for fraud are concerned, such a maximum limit would be quite as convenient a medium of deceit as an open mortgage. As a matter of fact, even when mortgages have been given for specific debts, inquiry is usually necessary to learn the balance unpaid; while mortgages of indemnity introduce not only uncertainty in amount, but contingency of liability. As yet there is no respectable authority which vitiates these. \* \* \* We are of the opinion that the law has been settled correctly, and that the supposed evils of permitting such transactions are no greater than those which attend very many other dealings of undoubted legality." The appellants contend that the case was decided under some statute which renders it of no force as a precedent. No statute is referred to by the court, either in the statement of facts or opinion. The objection that this case related to a real estate mortgage is without force, especially as the ground upon which it was decided, the necessity of so describing the indebtedness as to put creditors upon inquiry, is the very question made by the appellant in the case at bar. The case of *Briggs v. Mette*, 42 Mich. 12, 3 N. W. Rep. 231, is cited by appellants to show that the rule in the insurance case above referred to would not apply to a chattel mortgage. The *Briggs Case* was expressly based upon a statute which requires certain matters to be set out in an affidavit renewing a chattel mortgage, and in no

way militates against the holding in the insurance case. See, also, *Kramer v. Bank*, 15 Ohio, 260.

It is apparent that when the debt to be secured is a contingent liability, arising from the relation of a surety, the same certainty of description, in all respects, is not possible as in some other cases. Many cases are cited by counsel. We do not deem it necessary to refer to them further. After an examination of them, we are satisfied that the mortgage in suit is not so wanting in a proper description of the debt as to be void upon its face. It described the character of the debt. It disclosed that the indebtedness arose out of certain obligations assumed by the mortgagee for the mortgagor. The means were thus furnished creditors to ascertain from the parties to the mortgage the extent of the liability incurred for which the security was given. It appears from the petition that, at the time the mortgage was executed, the mortgagee was security on some nine different notes for the mortgagor, running to several different parties. Had these all been fully described, still the creditors would, in order to have known with any certainty as to what, if any, liability then existed, have been compelled to have made inquiry either of the parties to the mortgage, or of the holders of the several notes, to ascertain if they had been paid. The only additional burden imposed by the general description in the mortgage in suit is an inquiry of the parties to the mortgage as to the holders of the debt secured by it. If the appellant's contention is correct, then a bill of sale of chattels, absolute on its face, but which was in fact given as security for a debt, would be void as to creditors, because the indebtedness which it secured was not described in the instrument.

We think the demurrer was properly overruled.  
**AFFIRMED.**

LOUISA A. BELAU *et al.*, Appellants, v. A. M. BRYAN,  
Appellee.

**Conveyance of Real Estate: FRAUD: AGENCY: RELIEF.** The plaintiff, in consideration of certain land scrip agreed with W. to convey certain lands to such person as W. might designate. Thereupon W. negotiated a sale of the land to the defendant, to whom the land was conveyed by the plaintiff. The scrip received from W. having been found to be worthless, the plaintiff brought this action to cancel the deed to the defendant on the ground of fraud. *Held*, that, as W. was not the agent of the defendant, and the latter had no knowledge of the fraud practiced by W., the plaintiff was not entitled to the relief asked.

*Appeal from Plymouth District Court.*—HON. F. R.  
GAYNOR, Judge.

SATURDAY, OCTOBER 14, 1893.

THIS is a suit in equity, by which it is sought to cancel and set aside a conveyance of certain real estate made by plaintiffs to the defendant, on the ground that the same was procured by fraud and without consideration. There was a decree for the defendant, from which the plaintiffs appeal.—*Affirmed*.

*Argo, McDuffie & Reichmann*, for appellants.

*Ira T. Martin*, for appellee.

ROTHROCK, J.—It appears from the evidence that the plaintiffs made a contract with one Welliver, by which they agreed to exchange the land in controversy for certain land scrip, which on its face purported to be good for the location of six hundred and forty acres of land in the state of Texas. When the agreement was made it was understood that the plaintiffs would

convey their land to such person as Welliver might designate. After the agreement was made, Welliver set himself about finding some one to whom he could sell the land for a money consideration. He had a conference with one Richardson, who was agent for the defendant, which resulted in a sale of the land to the defendant, and in pursuance of that arrangement a deed of the land was made from the plaintiffs directly to the defendant. It is claimed by the plaintiffs that the Texas land scrip was absolutely worthless, and that Welliver practiced a fraud upon them in making the exchange, and that the defendant, by taking the conveyance of the land, adopted the fraud of Welliver, and that he should be regarded as the agent of the defendant.

If it be true that Welliver was the agent of the defendant in making the trade and procuring the land for her, she would be bound by any fraudulent representations he made to the plaintiffs, whether the defendant authorized him to make the representations or not. Counsel for appellants invoke this rule of law, and insist that under the evidence the conveyance of the land to the defendant should be set aside on account of the fraud. The case of *Eadie v. Ashbaugh*, 44 Iowa, 520, and other cases, are cited in support of the claim made. As we read the evidence, the rule of the cited cases has no application to the case at bar, for the reason that neither the defendant nor her agent had any knowledge of the arrangement made between Welliver and the plaintiffs. He was not their agent for any purpose. He made the arrangement for the exchange for himself. And there is no evidence to authorize a finding that there was any failure of consideration, so far as the defendant was concerned, in the transaction. It is unnecessary to set out and discuss the evidence. It fails to show that Welliver was the agent of the defendant, either by express

appointment or by ratification of his acts. The transaction is not really different in effect than it would be if the plaintiffs had conveyed the land to Welliver, and he had conveyed it to the plaintiffs.

The decree of the district court is **AFFIRMED**.

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**A. WRIGHT, Appellant, v. GEORGE WADDELL, Appellee.**

1. **Agistment: LIEN: CONSTRUCTION OF STATUTE.** The owner of a farm is not entitled to a lien, under section 1, of chapter 25 of Acts of the Twenty-fifth General Assembly, upon the stock of a farm hand kept on said farm during his term of service for said owner, and pastured on the latter's land, and fed with his grain, but which is otherwise cared for by such employee.
2. **Practice in Supreme Court: QUESTIONS CONSIDERED ON APPEAL.** Where the allegations of an amendment to a petition are treated as denied on the trial in the district court without the filing of any pleading by the defendant, the plaintiff can not claim upon appeal that the facts alleged must be regarded as admitted.
3. **Attachment: MALICE: EXEMPLARY DAMAGES.** Evidence in an action aided by attachment that the plaintiff knew that some of the grounds alleged for the issuance of the writ were false, and that he had no reason to believe that any of them were true, is sufficient to support a verdict for exemplary damages.

*Appeal from Wright District Court.*—HON. S. M. WEAVER, Judge.

SATURDAY, OCTOBER 14, 1893.

ACTION aided by attachment to recover an amount alleged to be due the plaintiff for pasturage, grain, and feed for horses and cattle owned by the defendant. The defendant denied the indebtedness alleged and pleaded counterclaims. There was a trial by jury, and a verdict and a judgment for the defendant. The plaintiff appeals.—*Affirmed*.

*J. C. Moats and Nagle & Birdsall*, for appellant.

*McGrath & Bryan*, for appellee.

ROBINSON, C. J.—The plaintiff claims that in the years 1890 and 1891 he received from the defendant, to pasture, feed, and keep for hire, one mare and her colt and two cows; that he pastured, kept, and fed them until about the thirteenth day of September, 1891; that the reasonable value of the pasturage, keeping, and feeding was the sum of one hundred and twenty-eight dollars. In his original petition he asked for the issuance of a writ of attachment against the property of the defendant, and as ground therefor stated that the defendant had absconded so that ordinary process could not be served upon him, that he was a nonresident of this state, and that he was about to convert his personal property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors. He also stated that his claim was for keeping, feeding, and pasturing stock, and as a lien therefor he asked an attachment. He filed in the office of the clerk an attachment bond, which was approved. A writ was issued, which was levied upon the property, on account of which the plaintiff seeks to recover. The defendant denies the allegations of the petition, and avers, by way of counterclaim, that the plaintiff is indebted to him for the use of the mare, the cows, a mower, and a wagon, for corn, and two hogs sold, in the sum of one hundred and forty-six dollars. The defendant asks judgment for that amount, and for the sum of one thousand dollars on account of the wrongful and malicious suing out of the writ of attachment. In an amendment to his petition, made after the answer was filed, the plaintiff alleged that when the action was commenced he was, and is now, entitled to a lien on the stock for his charges; that the stock has been, and is, in his possession; that his attorney, in preparing the petition, used a printed form, and by oversight and mistake omitted to erase therefrom the parts alleging

general grounds for an attachment, and by mistake they were permitted to remain in the petition, and he amended it by striking therefrom the parts so left therein by mistake. It does not appear that any answer to the amendment was filed. The jury found that the attachment was issued maliciously, and returned a verdict in favor of the defendant for two hundred and twenty-five dollars. Judgment for that amount and costs was rendered in his favor.

I. During the time in controversy the plaintiff owned a farm upon which he resided, although he was engaged personally in conducting business in a town in the vicinity. In September, 1890, the defendant commenced working for him on the farm for the term of one year at an agreed sum of money per month and house rent. The defendant moved upon the farm during the latter part of September, and kept thereon, during part of his term of service, the stock described and some hogs, all of which remained in his possession, and were fed and cared for by him. Some of it was kept in the pasture of the plaintiff a portion of the time, and was fed in part with grain and hay which belonged to him, and was kept in his yards and stables. This action was commenced on the last day of the defendant's term of service, and the stock on account of which the plaintiff seeks to recover was taken, and has since been held, under the writ of attachment. The court charged the jury as follows:

*Fifth.* As to the counterclaim based upon the attachment, you are instructed that under the undisputed facts in the case the issuance of the writ of attachment was wrongful, and that plaintiff had no lien upon the defendant's stock. If, then, you find from the evidence that in suing out said attachment the plaintiff acted maliciously, defendant will be entitled to recover such damages, if any, as he has suffered by reason of such wrongful act."

1. AGISTMENT:  
lien: con-  
struction of  
statute.

Whether the pleadings and evidence warranted the giving of this paragraph of the charge, so far as it related to the general grounds for an attachment, is a question not discussed by counsel, and for that reason will not be determined. The appellant contends that the paragraph is erroneous for the reason that he had a lien for pasturing, feeding and keeping the stock which he was entitled to enforce by the attachment under the provisions of chapter 25 of the Acts of the Eighteenth General Assembly. Section 1 of that act provides "that keepers of livery and feed stables, herders and feeders, and keepers of stock for hire, shall have a lien on all stock and property coming into their hands as such, for their proper charges and for the expenses of keeping when the same have been received from the owner, or from any person." We are of the opinion that the section quoted does not apply to cases of this kind. The plaintiff did not belong to any of the classes of persons enumerated. It is said that he was a herder and feeder and keeper of stock for hire, within the meaning of the statute. But that was not enacted for the benefit of persons who furnish pasturage and feed without having possession and control of the stock pastured and fed. The lien is given to the persons specified upon "stock and property coming into their hands" by virtue of their business, and is dependent upon the right of possession, and, when that exists, it is lost by a voluntary surrender of it, unless for a temporary purpose. *Shellhammer v. Jones*, 87 Iowa, 520; *Bray v. Wise*, 82 Iowa, 582; 1 Jones on Liens, sections 698, 699. There was no conflict in the evidence in regard to the care and custody of the stock, and we, therefore, conclude that, so far as criticised by the appellant, the paragraph of the charge in question was correct.

II. It is said that by failing to answer the petition as amended, the defendant admitted that its averments

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2. PRACTICE IN SUPREME COURT: questions considered on appeal.

were true. The amendment set out somewhat more at length than did the original petition the grounds of recovery upon which the plaintiff relies, and in addition alleged that the general grounds for attachment were set out in that petition by mistake, and withdrew them. The allegations of the original petition were denied by the answer, and the record shows that the case was tried on the theory that those in the petition as amended were also denied. The failure to deny them formally can not be urged for the first time in this court. *Burnett v. Lougridge*, 87 Iowa, 324.

III. It is said there was no evidence that the writ of attachment was issued maliciously, and that the court erred in instructing the jury that, if it was issued and levied maliciously, the defendant might be allowed exemplary damages. We think, however, that there was evidence from which the jury may well have found that the attachment was maliciously issued. It clearly appears that the plaintiff knew that some of the grounds alleged for obtaining it were false, and it does not appear that he had reason to believe that any of them made under the general statute were true. *Hurlbut, Hess & Co. v. Hardenbrook*, 85 Iowa, 606.

IV. It is urged, finally, that the amount of defendant's recovery is excessive. There was some conflict in the evidence in regard to what the plaintiff had furnished for the defendant, and its value, and in regard to what the defendant had furnished the plaintiff, and its value, but the jury were authorized to find for the defendant, on account of his claims, other than that of the wrongful and malicious suing out of the writ, in a considerable amount. The evidence also shows that the defendant sustained actual damage to a considerable amount from the serving of the writ in the loss of the use of his property. Therefore it can not be said that there was

3. ATTACHMENT: malice: exemplary damages.

no foundation upon which to rest an allowance for exemplary damages, and we can not say that the amount allowed is excessive.

We discover no reason for disturbing the judgment of the district court. It is, therefore, **AFFIRMED**.

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ANNA HEUSER, Appellant, v. MARION SHARMAN,  
Appellee.

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**Mortgage: PAYMENT BY THIRD PARTY: CANCELLATION: SUBROGATION.**

Where a mortgage was executed by a husband and wife upon their homestead to secure their joint indebtedness, and upon its maturity the amount of the mortgage debt was advanced by a third party to the husband, under an agreement that he should purchase the note and mortgage for such third party, and have the same properly assigned to her as security for her loan, but the husband failed, through inadvertence, to procure the assignment of the papers, and upon payment to the mortgagee the note and mortgage were marked canceled, the signatures cut off, and satisfaction of the mortgage entered of record, and the husband, upon discovering his mistake, offered to execute a new mortgage to the party who advanced the money, but the wife refused to join him therein, *held*, that the party advancing the money was entitled in equity to have her claim established as a lien upon the mortgaged property, and to a decree foreclosing the same, with the same effect as if the mortgage had been assigned to her.

*Appeal from Polk District Court.*—HON. C. P. HOLMES,  
Judge.

MONDAY, OCTOBER 16, 1893.

THIS is an action in equity by which the plaintiff seeks to set aside and cancel the satisfaction and discharge of a bond and mortgage upon certain real estate, and a decree that the plaintiff is the owner of said instruments, and that said mortgage is a valid lien on said real estate. It is also prayed that upon the restoration of said mortgage to the record, and the cancellation of the discharge of said bond, the said mortgage be foreclosed. There was a hearing upon the merits, and a decree dismissing the petition, and the plaintiff appeals.—*Reversed*.

*Cummins & Wright*, for appellant.

*Kauffman & Guernsey*, for appellee.

ROTHROCK, J.—The facts material to a determination of the questions involved are not in dispute, and are as follows: J. P. Sharman and the defendant, Marion Sharman, are husband and wife, and for a long time prior to the execution of the mortgage in controversy in this suit they had a homestead, consisting of a dwelling house situated on a lot in the city of Des Moines. The title to the property was in the defendant, Marion Sharman. On the twenty-sixth day of September, 1885, the said Sharman and wife executed and delivered to the New England Loan & Trust Company a mortgage upon said homestead to secure the payment of a note or bond, signed by both of the mortgagors, for the sum of eight hundred dollars, with interest at the rate of seven per cent. per annum, payable semi-annually. The note became due October 1, 1890. The plaintiff is a resident of the city of St. Louis. In the month of March, 1890, and for some time before that, J. P. Sharman was in that city. He was without means to pay the principal or interest of the mortgage debt, and being fearful of a foreclosure of the mortgage, and to prevent a loss of the homestead, he applied to the plaintiff for assistance. The plaintiff was a long-time acquaintance of Sharman and his wife, and after repeated solicitations on the part of Sharman, she procured a bank draft in an amount sufficient to pay the mortgage debt, and indorsed the draft to the Des Moines Savings Bank, and delivered it to Sharman, with the express agreement that Sharman should forward the draft to the bank, and purchase the note and mortgage for the plaintiff, and have them properly assigned to her as security for her loan. The draft

was forwarded by Sharman to the bank, inclosed in a letter, of which the following is a copy:

"ST. LOUIS, March 29, 1890.

"*Mr. Simon Casady.*

"DEAR SIR:—Enclosed a draft for eight hundred and twenty-eight dollars, to be paid the New England Loan & Trust Company; and take up mortgage which they hold against me. Will you be kind enough to take up the mortgage and insurance papers, and forward the same to my address? The mortgage is payable at the New England Loan & Trust Company's office. As I can not be in Des Moines to transact the business myself, I trust you will look after it for me.

"J. P. SHARMAN.

"3128 Lafayette Ave."

The note and mortgage was not owned by the New England Loan & Trust Company when the above letter concerning the remittance of the draft was received by the bank. Soon after their execution the loan and trust company assigned them to the Brattleboro Savings Bank of Vermont, but it was the custom of the loan and trust company to receive payment, and give notice to the holders of notes and mortgages sold by it. The notice was given, and the holder of the mortgage and note sent them to the loan and trust company, and the latter, after canceling the note and mortgage, and cutting out the signatures thereto, and releasing the mortgage of record, sent the note and mortgage to J. P. Sharman, at St. Louis. The plaintiff discovered at once that her agreement with Sharman had not been carried out, and that the transaction in form amounted to a payment instead of an assignment of the mortgage. Sharman acknowledged that it was not right, and he signed a new bond and mortgage to the plaintiff, and the same was sent to the defendant Marion Sharman, for her signature, together with a letter from her husband explaining the whole matter.

The papers were returned with the information that Marion Sharman refused to execute them. The defendant continues to hold the property as a homestead, and, at the time the plaintiff parted with her money, J. P. Sharman was insolvent, and he still remains in that financial condition. The plaintiff advanced her money in the full belief that its repayment was to be secured by an assignment of the mortgage; and she intended to extend the time of payment to accommodate Sharman and his wife, who were long time acquaintances and friends.

The question to be determined upon the foregoing facts is, whether the plaintiff is entitled in equity to have her claim established as a lien upon the property, and a decree foreclosing the same, with the same effect as if the mortgage had been assigned to her.

I. It is important at the outset of the consideration of the question to make plain the exact status and relation of the parties to the transaction at the time it occurred, and their present relation to the controversy. J. P. Sharman and his wife, the defendant herein, were jointly and severally liable for the payment of the debt for which their homestead was mortgaged. They were not only joint obligors; they were both principal debtors. One was not a surety for the other. The plaintiff's money was applied in payment of the debt, and, as the mortgagors are insolvent, the effect is that they have used the plaintiff's money to discharge the lien upon the homestead, and are just that much benefited, without making any recompense to the plaintiff; and, if the wife is permitted to hold the homestead discharged from the claim of the plaintiff, she has acquired a right as against the plaintiff without the plaintiff's consent. If the lien of the plaintiff is established, the defendant suffers no injury because she would be in precisely the same condition that she was before the plaintiff paid off the mortgage. These propositions,

which at once arise in the mind, appear to us to present the strongest equitable considerations in favor of the claim of the plaintiff.

Is there any equitable principle which requires us to hold that the plaintiff has no right, except a right of action, against J. P. Sharman for failing to perform his contract by procuring an assignment of the mortgage? It does not appear to us that the fact that the property is a homestead in any manner affects any right to a lien which the plaintiff might have if there were no homestead right. The homestead was charged with the payment of the mortgage, and, if the plaintiff has an equitable right to a lien, it must be worked out through the mortgage; in other words, it must be in the nature of subrogation to the rights of the mortgagee. The primary meaning of "subrogation" is the act of putting one person in the place of another, or the substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt. Formerly the right of subrogation was limited to transactions between principals and sureties, as, when a surety paid the debt of his principal to the creditor, the surety was entitled to have the full benefit of all mortgages or collateral securities for the debt, both of a legal and equitable nature. It has always been held that a party who, on his own motion, discharges the debt of another, without any agreement with either the debtor or creditor in relation to how he shall be reimbursed, is regarded as a mere volunteer, or, as some of the cases express it, an intermeddler, and is not entitled to the benefit of the mortgage or collateral security held by the creditor. While this may be said to be the rule now observed in courts of equity, yet the ancient doctrine of subrogation has been very much modified in recent decisions. It has been held that the right of subrogation is not founded on contract, but is the creation of equity, and enforced

solely for the protection of persons who, by paying the debts of others, should in good conscience be substituted in the place of the original creditor. But now it is held by many of the courts that where a third person pays the debt at the instance of the debtor, and upon an agreement or understanding with the debtor that he shall be entitled to the benefit of the security held by the creditor, equity will compel the debtor to do justly, and will substitute the person who discharges the debt to all the rights of the creditor whose claim the third person has discharged. *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. Rep. 453; *Detroit F. & M. Insurance Co. v. Aspinall*, 48 Mich. 238, 12 N. W. Rep. 214; *Levy v. Martin*, 48 Wis. 198, 4 N. W. Rep. 35; *Cobb v. Dyer*, 69 Me. 494; *McKenzie v. McKenzie*, 52 Vt. 271; *Emmert v. Thompson* 52 N. W. Rep. (Minn.), 31; *Baker v. Baker* 49 N. W. Rep. (S. D.), 1064. Without reviewing these authorities, it is sufficient to say that they fully sustain the rule above announced. In some of them there does not appear to be even an express contract that the substitution shall be made, but the right was enforced because of a mere understanding or expectation of the transfer of the security; in others the contract was that the mortgage should be paid, and a new one substituted for it; and in others, where new mortgages were made which were held to be invalid, it was held that the person making the payment was entitled to be subrogated to all the rights of the original mortgagee. This principle commends itself to us as eminently just.

II. It is contended with great confidence in behalf of the appellee that the question under consideration is not an open one in this state, and that, following the case of *Bailey v. Malvin*, 53 Iowa, 371, the decree of the district court in this case must be affirmed. The cases are clearly distinguishable. It is true the facts in the two cases are somewhat similar, so far as those

in the cited case appear. It is stated in the opinion that "the pleadings are very obscurely set out in the abstract." The principle decided in the case is that a debtor can not pay a note secured by a mortgage, and then reissue it to another, and authorize him to enforce the mortgage, not as against the mortgagor, but as against the other lien holders. In the case at bar no rights of third persons are involved. It is a question directly between the plaintiff and the mortgagor.

III. It is true, as claimed in behalf of the appellee, that she was not directly a party to the agreement that the mortgage should be assigned to the plaintiff. But ought she to be allowed to profit by the transaction without complying with the contract made by her husband and co-obligor with the plaintiff? It appears to us that every equitable consideration forbids it. She is in no position to demand that the satisfaction of the mortgage shall not be disturbed, and her property remain free and unincumbered. If she accepts the benefit of the plaintiff's money, she should be held to abide by the contract, under which the plaintiff made the payment. This is within the principle of the rule announced in *Eadie v. Ashbaugh*, 44 Iowa, 519, and *Davenport Sav. Fund and Loan Ass'n v. North American Fire Ins. Co.*, 16 Iowa, 74.

IV. It is insisted in behalf of the appellee that the Brattleboro Savings Bank was not bound to assign the mortgage, and could not have been compelled to do so, and the plaintiff can not be allowed to treat the transaction as an assignment because Sharman, who was her agent, violated his instructions, and paid the debt. The defendant ought not to be allowed to reap the benefit of the mortgage debt by the plaintiff for any such reason. It is purely a matter of speculation as to whether the savings bank would have assigned the mortgage. That proposition was not presented to its officers. It would have been a matter of entire indif-

ference to the savings bank whether it assigned the mortgage without recourse, or delivered it over as paid. The rights of the savings bank are in no manner involved in this action.

The decree of the district court is REVERSED.

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DAVID EVANS, Appellee, v. W. H. McKANNA, Appellant.

**Landlord and Tenant:** WRITTEN LEASE SUPERSEDED BY VERBAL LEASE: CONSIDERATION. Where a written lease of lands for a term of years was terminated by an oral agreement of the parties, whereby the lessee paid the rent in arrears, and agreed to vacate, but subsequently a verbal lease was agreed to upon new terms and conditions, and in pursuance thereof the lessee remained upon the land at the same rent, and the lessor in part made certain improvements agreed to be made, *held*, that the verbal lease was not a mere modification of the written lease, but a new contract, and that both parties having by their acts recognized the termination of the written lease, and attempted a performance of the verbal lease, it was immaterial whether there was a new consideration for the latter or not.

*Appeal from Mahaska District Court.*—HON. A. R. DEWEY, Judge.

MONDAY, OCTOBER 16, 1893.

ACTION for balance of rent due on a lease. From a verdict for the plaintiff, the defendant appeals.—*Reversed.*

*Bolton & McCoy* and *O. C. G. Phillips*, for appellant.

*G. C. Morgan* and *G. W. Lafferty*, for appellee.

KINNE, J.—The plaintiff, in writing, leased eighty acres of land to the defendant for the term of five years from and after March 1, 1887. He brings this action for a balance of rent claimed to be due for the years 1891 and 1892, and asks for the enforcement of his

landlord's lien. The defendant denies the execution of the lease for 1891 and 1892; admits he executed the lease attached to the plaintiff's petition, but avers that in February, 1889, he had a full settlement with the plaintiff, and the plaintiff agreed to and did cancel said written lease, and in consideration thereof the defendant agreed to move off of said premises by March 1, 1890; that after the making of said agreement, and prior to March 1, 1890, the plaintiff and the defendant entered into a new parol agreement whereby the defendant leased the same premises of the plaintiff for the term of one year from and after March 1, 1890, for the rental of two hundred and twenty-five dollars, one hundred dollars of which was to be paid when the defendant sold his hogs in the fall, and the balance to be paid March 1, 1891; that there is nothing due the plaintiff; that the attachment was wrongfully sued out, to the defendant's damage in the sum of five hundred dollars. In another count the defendant pleads a counterclaim for damages for the failure of the plaintiff to dig certain wells which it is claimed he agreed in the oral lease to dig. In an amendment to his counterclaim the defendant claims the sum of forty-seven dollars and ninety-five cents as due him for work and labor done for the plaintiff, and for vegetables sold him. The plaintiff denies that the lease sued upon was canceled or released; denies that he entered into a new oral agreement leasing the premises for one year from March 1, 1890, to defendant; denies that he reduced the rent, and denies that he agreed to dig any wells or furnish any additional water; avers that said oral agreement to cancel the lease and dig the wells was without consideration, and void, and denies all the allegations in the defendant's amendment contained. At the conclusion of the evidence the court, on the plaintiff's motion, directed a verdict for the plaintiff for the amount due.

I. The legal questions involved in this case are: *First.* Was a new consideration necessary to support the oral agreement for cancellation or surrender of the lease? *Second.* Can such an agreement, in writing, be changed by the oral contract of the parties? The original lease was in writing for a term of five years. Nearly three years of the term had expired when the alleged oral agreement of cancellation was made. It seems the defendant was about to leave the farm because of the pollution of and scarcity of water; that he so advised the plaintiff; that the plaintiff said he did not want him to leave, but agreed orally that if he would pay the rent then due he would release him. He did pay the rent, and agreed to leave the place prior to March 1, 1890. Before the time to leave arrived, negotiations were begun between the parties which resulted in a verbal lease on new conditions. By its terms the plaintiff was to finish a well, to dig other wells, build a hen house, and put up certain screens. The defendant was to pay two hundred and twenty-five dollars rent for the year.

We shall not attempt a review of the large number of cases cited by counsel touching the question of the necessity of a new consideration to support the oral agreement. The argument is that this oral contract was executory, and that the agreement to cancel the lease was never executed. But the facts in this case show that there was an agreement to cancel the written lease. Now, if that arrangement was fully consummated, as we think it was, and the parties actually entered into a new oral lease containing different conditions from those in the original lease, as they did in this case, and if in pursuance thereof the latter contract was in fact executed, or carried out by both parties, in whole or in part, it would certainly amount to a cancellation or surrender of the original lease. Such facts show a surrender by operation of law. See *Martin v.*

*Stearns*, 52 Iowa, 345. The contract has been acted upon by both parties; the defendant entered upon the land, or remained thereon under the new lease; the plaintiff in part performed his agreement thereunder by digging one of the wells. Here was an unequivocal act on his part showing his recognition of the new contract, and the fact that the original contract had been superseded. It is well settled that a surrender by operation of law may be effected by any agreement between the parties that the term shall be terminated, which is unequivocally acted upon by both. *Wheeler v. Walden*, 17 Neb. 122; *Phene v. Popplewell*, 12 C. B. (N. S.) 334; *Hall v. Burgess*, 5 Barn. & C. 333; *Bedford v. Terhune*, 30 N. Y. 453; *Witman v. Watry*, 31 Wis. 638; *Schieffelin v. Carpenter*, 15 Wend. 400.

This is not the case of a mere modification of the written lease. Nor does the fact that rent of the same character was reserved by the oral lease render it a mere change in or alteration of the original lease. It is a new contract, with new conditions. So far as appears, the payments under the last lease were not due at the same time provided for in the first; furthermore, the lessor bound himself to dig wells and make certain improvements on the demised premises for the better enjoyment of the same by the lessee. The evidence shows he entered upon this work, and actually did perform a part of it in accordance with the oral lease. Surely, in view of these facts, it can not be said that the lessor had not accepted the cancellation of the first lease, and a surrender of the premises thereunder. His acts in part complying with the conditions of the oral lease clearly show that both parties considered the written lease at an end. See *Raymond v. Krauskopf*, 87 Iowa, 602. In this view of the case, it is not material as to whether there was a new consideration or not, nor can the plaintiff be heard to say that the oral agreement is within the statute of frauds,

inasmuch as he has in part executed it, and both parties have acted unequivocally on it.

The district court erred in not submitting the cause to the jury. REVERSED.

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M. MEAGHER, Appellant, v. COURTNEY DRURY *et al.*,  
Appellees.\*

**Deeds: RECORD: LANDS LOCATED IN UNORGANIZED COUNTY: CONSTRUCTION OF STATUTE.** By an act of the legislature passed in the year 1853 Palo Alto county was attached to the county of Boone, the purposes for which it was so attached not being specified. In the year 1855 the same county was attached to the county of Webster, "for election, judicial and revenue purposes." *Held*, that a conveyance of lands in Palo Alto county, made in the year 1857, was properly recorded in Webster county, and that such record was constructive notice to a subsequent purchaser after the organization of Palo Alto county.

*Appeal from Palo Alto District Court.*—HON. GEORGE  
H. CARR, Judge.

MONDAY, OCTOBER 16, 1893.

ACTION in equity to quiet in the plaintiff the title to certain real estate. There was a hearing on the merits, and a decree in favor of the defendants. The plaintiff appeals.—*Affirmed*.

*Geo. E. Clarke and Thos. O'Connor*, for appellant.

*Soper, Allen & Morling*, for appellees.

ROBINSON, C. J.—The plaintiff claims to be the absolute and unqualified owner of one hundred and twenty acres of land, specifically described, situated in Palo Alto county. The land was purchased of the general government on the fifteenth day of June, 1857, by William

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\*The opinion filed upon the former submission of this case was withdrawn by the court, and for that reason is not published in these reports. It may be found in 53 N. W. Rep. 313.—REPORTER.

Stump, and a patent therefor was issued to him on the tenth day of December, 1859. In October, 1857, he and his wife conveyed the land to Christopher S. Whistler, by a warranty deed which was recorded in Webster county in February, 1858. In February, 1861, Whistler and wife, conveyed the land to Amanda T. Phillips; in July, 1862, Mrs. Phillips and husband conveyed it to C. T. Webb; in November, 1868, Webb and wife conveyed it to Otis J. Demmick; and in November, 1869, Demmick and wife conveyed it to the defendant Courtney Drury. The conveyance from Whistler and subsequent ones, were made by warranty deeds which were duly recorded in Palo Alto county. William Stump died in August, 1862. In July, 1884, after all the deeds mentioned had been recorded, his widow and heirs executed to John Jenswold, Jr., a conveyance of the land, and in October of the same year Jenswold executed a warranty deed which purported to convey it to the plaintiff. Drury and his grantors paid all the taxes on the land, or redeemed it from sales made for delinquent taxes for the years 1858 to 1883, inclusive, and the plaintiff has paid the taxes for the years 1884 to 1888, inclusive. When the plaintiff obtained his deed from Jenswold the records of Palo Alto county showed the entry of the land by Stump, and the conveyance thereof made by Whistler and others, in the chain of title through which Drury claims, but showed no conveyance from Stump to Whistler. The district court found and decreed that Drury is the owner of the land, and that the plaintiff recover the taxes he has paid, with interest. On a former submission of this cause we held that the decree of the district court was erroneous. A rehearing having been granted, the cause is again submitted for our determination.

The evidence satisfies us that the plaintiff purchased the land of Jenswold in good faith, for a valuable consideration, without actual notice of the deeds

through which Drury claims title. We are required to determine the effect of the recording in Webster county of the deed from Stump to Whistler. If it was properly recorded there, the plaintiff had constructive notice of it when he purchased from Jenswold, and acquired no title by his purchase; but if it was not properly so recorded, then the title to the land is vested in him.

I. Palo Alto county was established in the year 1851 by section 38 of chapter 9 of the Acts of the Third General Assembly, but it was not organized until after the general election of the year 1859. By section 1 of chapter 12 of the Laws of the Fourth General Assembly, enacted in 1853, it was attached to the county of Boone, but the purposes for which it was attached were not specified in the act. In the year 1855, by chapter 142 of the Acts of the Fifth General Assembly, Palo Alto was attached to Webster county "for election, judicial, and revenue purposes." It is contended by the appellant that, as the act of 1853 attached Palo Alto to Boone county without limitation in terms, it was so attached for all purposes, and that conveyances of land situated in Palo Alto could properly be recorded only in Boone county; that, as the act of 1855 attached Palo Alto to Webster county for election, judicial, and revenue purposes only, the county of Boone continued to be the one in which conveyances of Palo Alto county land should be recorded, until the organization of the latter was completed. The appellees contend that the recording of conveyances of land was for both judicial and revenue purposes, within the meaning of the act of 1855, and, therefore, that the deed in controversy was properly recorded in Webster county.

Section 1211 of the Code of 1851 was as follows: "No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded in the office of the recorder of deeds of the county in which the land

lies, as hereinafter provided." That provision was in force when the deed in question was recorded, and with slight change has remained the law until this time. But there was no recorder of deeds, and no office in which deeds could be recorded, in unorganized counties. Section 98 of the Code of 1851 provided that "unorganized counties and other districts now or hereafter annexed to any organized county for judicial, electoral or revenue purposes, shall, for those purposes respectively, be deemed to be within the limits of the county to which they are or may be so annexed, and to form a part thereof, unless otherwise provided by law." Fifty new counties were established in the year 1851 by chapter 9 of the Acts of the Third General Assembly. Chapter 95 of the acts of the same general assembly provided that three of the counties so established should become attached to Black Hawk county in case that should be organized before the next session of the general assembly "for judicial, elective and revenue purposes," and until such organization should be effected, Black Hawk and the counties to become attached to it were attached to Buchanan county "for judicial, elective, and revenue purposes." The title of the act was as follows: "An act to enable the counties of Bremer, Butler and Grundy to become attached, until organized, to Black Hawk county, and to attach said county to Buchanan county, until said organization." Chapter 8 of the Acts of the Fourth General Assembly, enacted in 1853, provided for the organization of certain counties therein named. By section 10 the territory included in Cass county was made to constitute one civil township, that included in Audubon county was made to constitute another, and that included in Adair was made to constitute a third, "the three for revenue, election, and judicial purposes constituting the county of Cass." The same act also attached the counties of Montgomery and Union to Adams, the county of Monona to the

county of Harrison, the counties of Crawford and Carroll to the county of Shelby, the counties of Ida, Sac, Buena Vista, Cherokee, Plymouth, Sioux, O'Brien, Clay, Dickinson, Osceola, and Buncombe, now Lyon, to the county of Waukau, now Woodbury, "for revenue, election, and judicial purposes." Section 8 of chapter 12 of the acts of the same general assembly attached the county of Chickasaw to Fayette "for election, revenue, and judicial purposes." By chapter 50 of the acts of the same general assembly the counties of Bremer, Butler and Grundy were attached to the county of Black Hawk "for judicial, elective, and revenue purposes." By chapter 8 of the Acts of the Fifth General Assembly the county of Carroll was attached to the county of Guthrie "for judicial, elective, and revenue purposes." Chapter 142 of the acts of the same general assembly attached the counties of Calhoun and Sac to the county of Greene, the counties of Wright, Humboldt, Pocahontas, Palo Alto, Kossuth, Hancock, Winnebago, Bancroft, now included in Kossuth, and Emmet to the county of Webster, and the county of Franklin to the county of Hardin, "for election, judicial, and revenue purposes."

In some cases, organized counties were attached to others for judicial purposes only, but it appears to have been the rule of the general assembly, when it attached an unorganized to an organized county, to state in effect that it was "for judicial, election, and revenue purposes." The only exception to that rule which we have observed is found in section 1, of chapter 12, of the Acts of the Fourth General Assembly, by which several unorganized counties were attached to others without any statement of the purposes for which they were so attached. By that section the counties of Mitchell, Howard, Floyd, Worth, and Franklin were attached to the county of Chickasaw, and by section 8 Chickasaw was attached to

Fayette "for election, revenue, and judicial purposes," as already stated. Thus a single act furnishes an example of the rule, and also the exception. What was the scope and effect of the first section, and what effect the attaching of Chickasaw to Fayette had upon the counties attached to Chickasaw, are questions which naturally arise, but which we need not determine. Several of the counties attached to others by the first section were afterwards attached to other counties for election, revenue, and judicial purposes, but there were numerous unorganized counties in the state, as those attached to Wahkaw by chapter 8 of the Acts of 1853, which were not attached for purposes not specified and not limited, but "for election, revenue, and judicial purposes." If it be true that those purposes did not include the recording of instruments affecting real estate, then there was no provision for recording instruments of that character affecting land in those counties until they were organized, and such instruments were of no validity as against subsequent purchasers for a valuable consideration without notice. We are satisfied that the general assembly did not intend that result. On the contrary, the general course of legislation in regard to unorganized counties, and the objects to be accomplished by it, satisfy us that in attaching an unorganized to an organized county "for judicial, electoral, and revenue purposes" the general assembly intended to make the unorganized county a part of the other for the general purposes for which counties were organized, excepting as might be otherwise provided. Among those purposes in the recording of the instruments affecting real estate.

The recording of a conveyance of real estate is not primarily for the purpose of aiding in the raising of revenue, but it has some relation to that end. It is usual, and within the intent of the law, to assess real estate for taxation in the name of the owner. This

may be important to correct errors in the assessment and payment of taxes, to establish a right to redeem from tax sales, and for other purposes, and the record of conveyances would afford a guide to officers charged with the duty of collecting public dues, and a means for determining questions which might arise in connection with the right of taxation and the duty to pay taxes. Moreover, when the legislative acts under consideration were enacted, the fees for recording instruments inured to the benefit of the counties in which they were recorded, and were a source of revenue. We conclude that the recording of instruments affecting real estate was included in the purposes, for which Palo Alto county was attached to Webster in the year, 1855, and that the deed of Stump to Whistler was properly recorded in the county last named.

It is claimed that if the deed to Whistler was properly recorded in Webster county, yet the Code of 1873 required that it be recorded in Palo Alto county, in order that the record might give constructive notice of it, and repealed the statute which authorized the recording in Webster county. This claim is not well founded. It is true that all public and general statutes passed prior to the session of the general assembly which enacted the Code of 1873 were repealed, but the repeal was subject to the limitations and exceptions expressed in the Code, one of which was that the repeal of an existing statute should not "affect any act done, any right accruing, or which has accrued or been established. \* \* \*" Code, sections 47, 50. The recording of the deed in Webster county was an act done which created a right within the meaning of that provision. It follows from what we have said that the judgment of the district court must be **AFFIRMED.**

KINNE, J., took no part in this case.

C. L. BROWN, Appellant, v. FELIX GARTEN *et al.*,  
Appellees.

**Wills: PAROL AGREEMENT TO MAKE ONE DEVISEE: EVIDENCE.** In an action against the administrator and heirs of the estate of a decedent to enforce specific performance of an alleged agreement between the plaintiff and said decedent, whereby the latter was to will the plaintiff all of her property if he would live with, and take care of, her as long as she lived, it appeared that the deceased was seventy years old when she died, and had an estate valued at about six thousand dollars; that the plaintiff had been raised and educated by the deceased and her husband, and that he returned from school and took up his abode with the deceased only about three months before she died; that the alleged oral agreement to devise all of her property to the plaintiff consisted of statements and declarations made by the deceased during these few months preceding her death; that, after her death, the plaintiff claimed certain articles of personal property when the administrator was preparing his inventory, bid in certain property at the administrator's sale, giving his notes therefor, filed a claim for two months' work rendered the deceased, and did other acts inconsistent with his claim herein of the alleged contract. *Held*, that the agreement was not established by the evidence.

*Appeal from Lucas District Court.*—HON. W. I. BABB,  
Judge.

MONDAY, OCTOBER 16, 1893.

THIS is a suit in equity, brought against the administrator and heirs of Nancy Critser, deceased, to enforce the specific performance of a verbal contract, which the plaintiff alleges he made with the deceased, by which she agreed with the plaintiff that, if he would live with her, and take care of her as long as she lived, he should have all of her property at her death, and that she would carry out the said contract by her will. It is claimed that the plaintiff fully performed said contract, but that said deceased, in consequence of sudden sickness, was prevented from making her will as she promised and intended to do, and died

intestate. There was an answer in the nature of a general denial. A hearing was had on the merits, and the plaintiff's petition was dismissed, and judgment was rendered for the defendants for costs. The plaintiff appeals.—*Affirmed*.

*Stuart & Bartholomew*, for appellant.

*Mitchell & Penick*, for appellees.

ROTHROCK, J.—It is contended by the parties that this appeal must be determined upon the single fact whether such a contract as the plaintiff claims was actually made. An examination of the competent evidence in the case leaves us in no manner of doubt on that question. Nancy Critser, the deceased, was the owner of a farm and certain personal property of the aggregate value of from six thousand to seven thousand dollars. She died in the month of April, 1890, at the age of seventy years. The deceased was a widow. She was united in marriage with Jacob Critser in the year 1837. She and her husband resided on the farm, and he died in the year 1880, and by his will devised the farm to her, and she continued to reside thereon until her death. They never had any children. When the plaintiff was about one year old, the said Critser and his wife received him into their home, and cared for and supplied him with food and raiment, and sent him to school, the same as if he had been their own child. He was absent from home at school for some time, and up to about three months before the death of Nancy Critser. The plaintiff was twenty-three years old at the time of the trial in the court below.

The competent evidence of an oral contract, such as claimed by the plaintiff, consisted of statements and declarations made by the deceased during the last few months of her life. These statements are, to say the least, competent evidence that the deceased intended

to make a will, and devise all of her property to the plaintiff. It is true, many of these statements were made in conversations about her feeble health, and her need of assistance in her old age, and are what are sometimes called "loose and random statements." On the other hand, the acts of the plaintiff after the death of Mrs. Critser show quite conclusively that he had no thought that any such contract existed. We need not cite all of these acts. A reference to some of them will be sufficient. An administrator was appointed a few days after the death of Mrs. Critser, and an inventory of the personal property was taken. While the inventory was being made the plaintiff claimed the ownership of a number of articles of property, including a saddle and bed. They were left out of the inventory and given to the plaintiff. A public sale was had. The plaintiff was present, and assisted at the sale. He bid off a horse and a wagon, and gave his note, with security, the same as other purchasers. After the inventory, and before the sale, he claimed one of the horses listed in the inventory, and brought an action of replevin for the horse. He made a claim against the administrator for two months' work. He verified and filed the claim, and it was paid. The time that he claimed for his work was the two months previous to the death of Mrs. Critser. Afterward he conceived the idea that he ought to be made an heir, and have some of the property.

It is true that the plaintiff claims that these acts and claims made by him occurred because he was ignorant of his rights. It would be rather a wide departure from the proper consideration of evidence to accept such an explanation. The fact stands out all through the record that all of the acts of the plaintiff up to about the time this suit commenced are absolutely inconsistent with the claim that any such contract as he now asserts ever existed. The case requires

no further consideration. When it is conceded, as it must be, that to enforce such a contract it must be established by clear and unequivocal evidence, it is an end of the case. As we read the evidence, it falls far short of that test, and there are no equitable considerations in favor of the plaintiff.

The decree of the district court is **AFFIRMED**.

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**WILLIAM M. BOYLE**, Appellant, v. **PLYMOUTH COUNTY**,  
Appellee.

**Sheriffs: FEES: EXPENSES: CONSTRUCTION OF STATUTE.** Under the provisions of section 4 of chapter 94 of Acts of the Nineteenth General Assembly, giving to the sheriff of a county "for each warrant served two dollars, and the repayment of any amount actually paid out by him as necessary expenses in executing such warrant as sworn to," a sheriff is not entitled to repayment of money expended for a team and carriage necessary for his personal conveyance to the place of service of a warrant placed in his hands, nor for the proper feeding and care of a team while in use for such purpose.

*Appeal from Plymouth District Court.*—**HON. F. R. GAYNOR**, Judge.

**MONDAY, OCTOBER 16, 1893.**

**ACTION** to recover sheriff's fees. The plaintiff is the sheriff of the defendant county. The amount in controversy being less than one hundred dollars, the legal propositions to be considered are presented by a certificate from the trial judge. The question certified under the first count of the petition is as follows:

"*First.* When, in a criminal proceeding for a violation of a statute of the state, a justice of the peace issues a warrant, and places it in the hands of a sheriff for service, and, in the proper discharge of his duty to serve the same, it becomes necessary for said sheriff to use a team of horses and carriage to travel to the place where said arrest is made, is he entitled to recover from

the county money paid out for the use of a team hired and used by him for such purpose, when, upon the trial of said cause, the defendant is acquitted, and the costs taxed to the state, including the costs of said conveyance, which cost is included by the sheriff in his bill of fees and expenses for the service of said warrant?"

The legal propositions submitted under the second and third counts of the petition are with the facts substantially the same, except that in those counts the sheriff used his own team, and in the second count he seeks to recover "for the proper feeding and care of said team," and in the third for "the reasonable value of the use of said team." The cause was before the district court upon a demurrer to each of the three counts of the petition, which the court overruled as to the first count of the petition, and sustained it as to the second and third counts, holding, in effect, that there could be a recovery for money expended in hiring a team, but not for the expenses for the feeding and care of his own team, nor for the use of the same. From a judgment in harmony with the rulings both parties appeal.—On plaintiff's appeal, *affirmed*; on defendant's appeal, *reversed*.

*Ira T. Martin*, for plaintiff.

*Patrick Farrell*, for defendant.

GRANGER, J.—The questions involve a construction of the law as to the compensation of sheriffs, and chapter 94 of Acts of the Nineteenth General Assembly, is upon the subject. The chapter has numerous provisions providing compensation for particular services, and also provides an annual salary for attending courts, "and for other service for which no compensation is allowed by law." Section 4 of the act provides for compensation for serving warrants, in the following language: "For each warrant served, two

dollars, and the repayment of any amount actually paid out by him as necessary expenses in executing such warrant as sworn to by the sheriff. If service of the warrant can not be made, the repayment of all necessary expenses actually paid by the sheriff, while attempting in good faith to serve such warrant within this state, and such reasonable compensation as the board of supervisors may deem just and equitable." Section 13 of the act gives "mileage in all cases required by law, going and returning, per mile, five cents." We do not think the personal expenses of the sheriff in traveling to and from the place of serving the warrant are the "necessary expenses in executing it," within the meaning of the act. Certainly, a repayment of money paid for a team for the personal conveyance of the sheriff comes no more within the meaning of the act than would the repayment of railroad, boat, or stage fare, or, for that matter, the subsistence of the sheriff in going to and returning from the place of serving a warrant; and it is not claimed that such expenses are contemplated by the law.

The law, then, does not mean all necessary expenses, but certain expenses that are to be sworn to by the sheriff. In the service of a warrant the law contemplates, in all cases, a loss of time, for which two dollars are allowed, and that there may be expenses of travel, for which the mileage is allowed. These are designed as full compensation for the service and ordinary expenses of the sheriff. They may in some cases, where the particular service is considered without reference to the general duties of the sheriff, seem inadequate, and this is perhaps true of particular services rendered by all officers where fees are allowed; but the design of the law is, by a graduation of all fees, to make the entire compensation of the officer adequate for his entire service, and hence the mere fact that the allowance for service and mileage is not a

sufficient compensation for the time given and the money expended is not controlling.

There are often expenses other than those usually incurred in the service of a warrant, as necessary additional expense for the conveyance of the person arrested, his subsistence, and perhaps assistance to make the arrest or retain the prisoner after the arrest. Such as these are the necessary expenses contemplated by the law, for which there is to be a "repayment." We are clearly of the opinion that the sheriff is no more entitled to repayment of money expended for a team for his personal conveyance than he would be to compensation for the use of his own team. It is true the law uses the term "repayment," which would be applicable to the case of hiring or expending money for a team, and this may have been the controlling thought with the district court; but we are not prepared to say that it was the intent of the law to provide that in case a sheriff used his own team it should be without compensation, but if he expended money for the use of one it should be repaid. It is the use of the team in either case, and there is no reason for the distinction. What we have said applies alike to the question as to repayment of expenses for the keeping and care of the sheriff's team.

The plaintiff makes the point in argument that the justice of the peace gave judgment for these claims, or allowed them as costs in the criminal proceeding, and that the remedy was in those proceedings to avoid the effect of such allowance, and not in this. It is sufficient to say that the court has certified to us no such question, and we are limited to the considerations of the questions certified.

We think the questions certified should be each answered in the negative. Our considerations lead to the following conclusions: On the plaintiff's appeal the judgment is **AFFIRMED**; on the defendant's appeal it is **REVERSED**.

HARRIET BONSON *et al.*, Appellants, v. GEORGE W. JONES, Appellee.

1. **Title to Real Estate: RESERVATION OF MINING RIGHT IN DEED: CONSTRUCTION.** The claimants to certain real estate, while the title thereto was still in the government, transferred all their interest therein to an adverse claimant, reserving to themselves, however, the privilege of mining and drifting any crevice or range, struck by them on their own ground, through the land conveyed, and reserving, further, the privilege of sinking shafts on the latter by paying to said grantee one sixth of all the mineral discovered or raised as rent on the conveyed premises. Subsequently said grantee acquired title to said premises from the government, and by successive conveyances, made subject to the rights of the above grantors, they became the property of the plaintiff's devisor. The defendant claims to have acquired said mining right by purchase from said grantors, or those claiming under them, and had mined on said premises almost continuously for about thirty years when this action was commenced to quiet the title thereto in the plaintiffs. Before his death the plaintiff's devisor paid the defendant for ore mined on said lands. *Held*, that the reservation in said original deed was not that of a mere life estate, which terminated with the death of the grantors in said deed, nor a personal privilege or license only, which could not be assigned, but gave the grantors and their grantees a continuing right to mine through said premises, limited only by the extent of the range that should be discovered.
2. ———: ———: ———: **BUILDINGS ERECTED ON LANDS OF ANOTHER.** No right being reserved in said original deed to erect buildings on the conveyed premises for use in connection with the mining thereof, *held*, that the burden was upon the defendant to show that the privilege to erect houses on said lands was necessary to the right to work the mine, and that, in the absence of such evidence, the title to a permanent dwelling on said premises, voluntarily erected by the defendant, should be quieted in the plaintiff.

*Appeal from Dubuque District Court.*—HON. D. J. LEN-  
EHAN, Judge.

MONDAY, OCTOBER 16, 1893.

ACTION in equity to quiet in the plaintiffs the title to certain real estate. There was a hearing on the mer-

its, and a decree in favor of the defendant. The plaintiffs appeal.—*Modified and Affirmed.*

*Robt. Bonson and R. W. Stewart*, for appellants.

*William Graham and John Deery*, for appellee.

ROBINSON, C. J.—The plaintiffs claim to be the absolute and unqualified owners of mineral lots numbered 264 and 265 and of lot numbered 1, of Union place, a subdivision of mineral lot numbered 268, all in Dubuque county, including all mineral rights thereto appertaining, and that such ownership was acquired by them as devisees of Richard Bonson, deceased. The lots are traversed from east to west by a vein of lead ore known as the "Karrick Range." The defendant concedes that the plaintiffs are the owners of the lots, subject to his rights therein, which are claimed to be as follows: *First*, the title in fee to Karrick range in lot 1, subject to the obligation to pay to the plaintiffs as rent one sixth of the mineral taken therefrom; *second*, the title in fee to the Karrick range in lots 264 and 265 subject to the obligation to pay a reasonable mineral rent for lot 265; *third*, the right to occupy a portion of the surface of the lots for the dwellings of workmen. The defendant asks that his interest in the Karrick range be established as against the plaintiffs. The plaintiffs, by way of reply, claim that whatever right the defendant may have had in the property has been forfeited. The district court decreed that the plaintiffs' bill be dismissed, and that "the defendant's mineral and mining interest in lot 264 and mining right in lot 265 and lot 1, Union place, is hereby established, subject to the payment to the plaintiffs of one sixth rent in said lot 1, and a reasonable rent in lot 265."

I. On the twenty-seventh day of February, 1847, William Carter entered into an agreement in writing

with George W. Starr and John T. Cook, which was duly acknowledged and recorded, a copy of which is as follows:

“Memorandum of agreement made and entered into this twenty-seventh day of February, 1847,

between Wm. Carter, of Dubuque county, Iowa, of the one part, and Geo. W. Starr and John T. Cook of the other part, as follows, to wit: The said Wm. Carter,

1. Title to real estate: reservation of mining right in deed: construction.

for and in consideration of certain transfers, relinquishments and stipulations hereinafter mentioned, made by said Starr and Cook, party of the second part, to him, the said Carter, party of the first part, doth hereby relinquish, release and transfer to the said Starr and Cook all his right, title and interest to all the ground or mineral lots heretofore claimed by him, and contested by the said Starr and Cook, and also to a strip or piece of land being on the north side of said ground in contest between the said parties, and between the northern boundary of said ground and a line run or surveyed by Mr. Calhoun during the past year, and also a strip or piece of land lying on the south side of said ground in contest, and between the northern boundary of the same and the middle of the main public road, the three pieces or parcels of land making one tract, which is to extend west towards the said Carter's inclosed farm, to within fifteen feet of the fence now inclosing said Carter's farm on the east side. And the said Starr and Cook do hereby release, relinquish and transfer to the said Carter all their right, title and interest and claim to all the ground now claimed by said Carter, and on which they, the said Starr and Cook, heretofore claimed a mining right, lying west of said line fifteen feet east of the fence now inclosing said Carter's farm, reserving or still holding and enjoying the privilege of mining and drifting any crevice or range struck by them on their own ground through

said Carter's ground, with the privilege of sinking shafts on said Carter's ground by paying to said Carter one equal sixth portion of all mineral discovered or raised, as rent on said Carter's ground, lying west of the line, fifteen feet east of the fence. And it is furthermore agreed upon, by and between the said parties, that a road thirty feet wide, extending fifteen feet either side from the division line, now fifteen feet east of said Carter's fence, shall be kept open and unclosed for the purpose of a road. In witness whereof the said parties have hereunto set their hands and seals, the day and year first and above written.

"WILLIAM CARTER,

"GEO. W. STARR,

"JOHN T. COOK.

"In presence of: W. Lewis, Thomas H. Benton, Jr."

The appellee, to support his claim to lot 1, Union place, relies especially upon the reservation made by Starr and Cook, in words as follows: "Reserving or still holding and enjoying the privilege of running and drifting any crevice or range struck by them on their own ground through said Carter's ground, with the privilege of sinking shafts on said Carter's ground by paying to said Carter one equal sixth portion of all mineral discovered or raised, as rent on said Carter's ground." On the thirteenth day of March, 1847, Carter became the owner in fee of lot 268, also known as "Carter's Field," by purchase from the United States. In the year 1856 the lot was subdivided, and lot 1 of Union place was made one of the subdivisions. In October of that year, Carter conveyed to C. H. Booth lot 1, by a warranty deed, subject to an incumbrance, described as "a certain agreement entered into between myself and Geo. W. Starr and John T. Cook on the twenty-seventh day of February, 1847, and recorded," etc. In June, 1877, Booth conveyed the lot to Richard Bonson by a warranty deed,

subject to an incumbrance, described the same as in the deed to Booth.

Lot 264, sometimes called the "Starr Lot," east of and adjoining lot 1, was purchased of the United States by George L. Nightingale and William Carter, and by them conveyed to Starr on the twenty-fifth day of March, 1847. Lot 265, otherwise known as the "Levi Lot," east of and adjoining lot 264, was purchased of the United States by Nightingale on the twelfth day of March, 1847, and in March, 1848, it was conveyed to A. Levi. In May, 1848, Starr, Levi and one John Noel entered into an agreement, of which the following is a copy:

"Articles of agreement made and entered into by and between George Starr and John Noel and Alexander Levi, all of the city and county of Dubuque, state of Iowa, witnesseth, that the said Starr, Noel and Levi covenant and agree with each other to dig and mine in partnership the following land and mineral ground, lying and being situated in the county of Dubuque, and known as the 'Levi Lot,' or mineral lot 265, also the 'Starr Lot,' or 264, lying immediately west and adjoining the Levi lot, and, finally, so much of the ground through William Carter's field as was granted by the said Carter to the said Starr for mining purposes, which grant was made by an instrument of writing between the said Carter and Starr, bearing date the twenty-seventh day of February, 1847. And the said Starr, Noel, and Levi are to do an equal portion of the work, and pay an equal portion of all expenses necessary to carry on the mining on any of the land above described, and to share equally, after paying the ground rent, all the mineral which may be discovered by or through them on the land aforesaid; the rents to be paid are as follows: On the Levi lot one fourth, on the Starr lot one fourth, and on the Carter field one sixth, of all the mineral raised or taken out of the

respective lots, and the rents aforesaid shall be paid over and delivered up to the respective owners of the same, each owner to have all the rents arising from his own lot. It is further agreed by the parties that this instrument of writing shall be irrevocable so long as there remains a prospect of making mineral discoveries, or the mineral is worked out, or the mineral in sight. In witness whereof the aforesaid have hereunto set their hands and seals, this thirty-first day of May, 1848.

"GEORGE W. STARR.

"JOHN NOEL.

"ALEX. LEVI.

"Executed in presence of L. Nadean."

In some manner not fully disclosed by the record, George W. Samuels acquired an interest in the mining right in controversy, which has been transferred to the defendant. George W. Karrick at one time had an interest in the same right, but through conveyances, which need not be described, the defendant acquired his interest, and also that of Starr, Levi, and Noel, in the same right. Whether Cook ever made a formal transfer of the rights he acquired under the Carter agreement does not appear. The plaintiffs do not claim to have acquired it, unless by operation of law on the death of Cook. The defendant testifies that about the year 1855 the right in controversy was owned by Samuels, Karrick, Starr, and Levi; that at different times he purchased their interests, and about the year 1860 became the sole owner of the right. The case of *Levi v. Karrick*, 13 Iowa, 345, grew out of transactions involving the use of the right before he claims to have become its sole owner.

The appellants contend that the title to the property claimed by the defendant was vested in the general government when the Carter agreement was made, in February, 1847; that the agreement merely transferred certain alleged rights without words of warranty, and

that it was not effectual to transfer any interest; that the description of the property conveyed was so indefinite that no surveyor could locate the property; and that the agreement was without effect as a conveyance for that reason. The appellants further claim that the agreement transferred to Starr and Cook at most, only a life estate, which has been terminated by their death; that the interest transferred was only a license, personal in its nature, which was revoked by assignment, if not terminated by the death of the licensees; that the interest of the defendant, if anything, was that of a tenant, which has been terminated by a denial of the title of his landlord.

It must be admitted that there are defects in the paper title of the defendant, but it is clear he has been in possession of the right in question, by himself and tenants, under a claim of ownership adverse to all others, for about thirty years. The Carter agreement, which is the foundation of his title, was evidently made in settlement of conflicting claims to mineral lands which the parties to it had been making. The description of the property conveyed, although somewhat indefinite in terms, seems to have been sufficiently full and specific for all practical purposes, when applied to the property to which it referred. There is no suggestion that any difficulty has been met in ascertaining that property. On the contrary, possession of the Karrick range was held when the agreement was made, or was taken soon after that time by parties through whom the defendant claims, and has been held continuously since.

The agreement reserved to Cook and Starr, not a mere life estate, but the right to work through the ground yielded to Carter any crevice or range struck by them on their own ground, and the Karrick range was so struck. The privilege or right thus reserved was limited only by the extent of the range which

should be discovered. This is shown in part by the construction placed upon the agreement by the parties to it and their immediate successors in interest. The defendant has caused the range to be worked almost continuously since he purchased it. His share of the mineral raised was delivered to Richard Bonson, the deviser of the plaintiffs, a smelter, who recognized the right of the defendant to the range, and paid him for the mineral. As against the defendant the plaintiffs acquired no rights by the will of Richard Bonson which he could not have asserted, and he purchased the land with knowledge of the rights of the defendant. His title to it, subject to the claims now made by the defendant, has not been denied by the latter, and his rights have not been terminated by the death of the parties to the Carter agreement, nor by any act on his part. He has been in quiet and peaceable possession of the range, under a claim of right, too long to be disturbed now.

II. The petition alleges that the defendant erected a frame house on lots 264 and 265, less than two years before this action was commenced, without authority from the plaintiffs, and that he is now in possession of it, and has tenants living therein. The defendant, in his

2. —: —: —:  
buildings  
erected on  
lands of  
another.

answer, admits that these allegations are true, and avers that he erected the house by virtue of his ownership of an interest in the lots. The pleadings justify the presumption that the house is a permanent structure, which must be regarded as a part of the lots upon which it stands. The defendant states as a witness that he claims the right to erect shanties on the surface of the lot for his men to live in, but no evidence was offered to show the character of the house, nor the purpose for which it was built, nor that it is used in connection with the working of the range. The Carter agreement does not in terms reserve the right to erect

buildings upon the surface of the land, and, if there was such a reservation, it was implied as appurtenant to the right which was expressly reserved. Nothing in the evidence submitted shows that the privilege of erecting houses was necessary to the right to work the mine, nor that such privilege was ever claimed by the defendant until recently. From what source he claims the privilege does not appear. The burden was on him to show that he had a right to erect and maintain a house, and that he has failed to do. The house was erected by him voluntarily, with knowledge of his legal rights, and must be regarded as a part of the realty owned by the plaintiffs. Therefore the district court erred in not adjudging the title to the house to be in the plaintiffs, and in failing to quiet the title thereto in them.

The appellants complain that the decree was not sufficiently specific in defining the rights of the defendant in the Karrick range. That objection should have been made in the district court, and, as it was not, will not be further considered by us.

The decree of the district court is **MODIFIED AND AFFIRMED.**

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**ORA M. WILCOX, Appellee, v. SARAH E. WILCOX *et al.*,  
Appellants.**

1. **Estates of Decedents: HOMESTEAD: WIDOW'S ELECTION AFTER MORTGAGE OF DISTRIBUTIVE SHARE.** Where, five years after the death of her husband, and while continuing to occupy the homestead, a widow executed a mortgage upon her undivided one third interest in her husband's estate, and afterwards executed another mortgage upon the same and the undivided interest of one of the heirs, which she, with another heir, had acquired by conveyance, and thereafter the widow filed a petition to have such distributive share set apart to her, and a decree was entered according to her prayer, but was subsequently set aside on the petition of one of the heirs, *held*, that she could not thereafter make her election to take the homestead, and thus defeat the lien of said mortgages,

89 388  
d89 555  
89 388  
98 40  
89 388  
105 374  
89 388  
108 706  
89 388  
d131 175

2. ———: DOWER: HOMESTEAD: ELECTION. The primary interest of a widow in her husband's estate is her distributive share, and an election is necessary only when she desires to take the homestead in lieu of dower; but there may be an express election to take the distributive share, and any act indicating such election will negative an intention to take the homestead, though continuing to occupy it for a number of years.

*Appeal from Mahaska District Court.*—HON. A. R. DEWEY and HON. D. RYAN, Judges.

MONDAY, OCTOBER 16, 1893.

WILLIS C. WILCOX died in 1881, seized of about one hundred and twenty-five acres of land, of which forty acres constituted his homestead. He left surviving him a widow, Sarah E. Wilcox, and seven children, among whom were the plaintiff, Ora M., and William H. and Richard D. Wilcox. All the land is in one tract, and has since been occupied by the family. No administration was ever had on his estate. This suit is by one of the heirs, and is for a partition of the land.

A distribution of the land among the widow and all the heirs would give to her, the widow, seven twenty-firsts, and to each of the heirs two twenty-firsts. Since the death of Wilcox, Richard D. has conveyed his interest to his mother and William H. Wilcox, so that each has one half thereof, or an additional one twenty-first part of the land, making the widow's interest eight twenty-firsts, and that of William H. Wilcox three twenty-firsts. The petition for partition represents that the widow is entitled to the use and occupancy of the homestead during her natural life, and that she desires to occupy the same in severalty, and a confirmation of shares is asked on the basis of this homestead right to the widow, which would make the shares, outside of the homestead forty acres, as follows: To the widow one fourteenth, to W. H. Wilcox three fourteenths, and to the five heirs each one seventh.

On the twenty-ninth day of April, 1887, the widow executed a mortgage to C. P. Searle on the undivided one third of all the land for one thousand, two hundred dollars, who afterwards assigned the mortgage to one Buxton, who is a defendant. On the second day of February, 1888, the widow and William H. Wilcox made a mortgage to B. F. Hostetter for one thousand, five hundred and three dollars, and twenty-three cents on the "undivided thirteen twenty-firsts" of all said lands, subject to the mortgage to Searle given by the widow. On the seventh day of December, 1888, the widow filed her petition in court to have set off to her one third of the land as her distributive share of the real estate under the law, and also her interest therein because of her purchase from Richard D. Wilcox, and a decree was entered to that effect. The decree was afterwards, on motion of W. H. Wilcox, set aside, because of a failure of service on him, and afterwards the widow withdrew her petition, and no further action was taken in that proceeding. The mortgages were each foreclosed, the lands sold on execution, and deeds given in pursuance thereof. Buxton and the representatives of Hostetter, now deceased, are parties defendant, and by answer insist on the validity of their respective mortgages, under the facts of their execution, and the election by the widow in her proceeding to have set off to her her distributive share. The decree of the district court sustained the claim of the widow to a homestead right, and denied partition in regard thereto; the effect of the decree being to discharge the widow's share in the estate from the operation of the mortgages and proceedings thereunder, except as to one fourteenth thereof, purchased from Richard D. Wilcox. J. E. Buxton and L. A. and H. H. Hostetter, administrators, appeal.—*Modified and Affirmed.*

*John F. & W. R. Lacey*, for appellants.

*Seevers & Seevers*, for Ora M. Wilcox, appellee.

*L. C. Blanchard*, for Kalbach & Son, appellees.

GRANGER, J.—A few facts will bring us to the pivotal question. Something more than five years after the death of her husband, the widow, Sarah E. Wilcox, made to Searle a mortgage on what would be her distributive share in her husband's estate, and obtained one thousand two hundred dollars, and warranted the title against all persons whomsoever. Soon after, she placed another mortgage on the same and the one fourteenth obtained from Richard D. Wilcox, and received upwards of one thousand, five hundred dollars. It is not to be even doubted that these mortgages were given with the understanding that she had determined to take her distributive share in the real estate. Soon after, she filed her petition to have such share set apart to her, and a formal decree was entered to that effect. In her petition for distribution she says "that the plaintiff, Sarah E. Wilcox, is entitled to dower in said real estate, to wit: The undivided one third thereof in fee simple, in value, and she elects and avers that the same should be set off to her in these proceedings in fee simple, to be absolutely hers." She now seeks, by withdrawing her petition, to take her homestead right, and defeat the mortgagees of the security she so solemnly pledged, and without any proffer to return the money obtained. It is important to know upon what theory of the law it can be done.

*McDonald v. McDonald*, 76 Iowa, 137, is cited for the support of such a rule. *Egbert v. Egbert*, 85 Iowa 525, expressly qualifies the apparent scope of some lan-

1. ESTATES of decedents:  
homestead:  
widow's election after  
mortgage of distributive  
share.

guage in that case, from which is deduced a broad rule that, so long as the homestead is occupied by the widow, there can be no such election to take the distributive share; that a mortgage on the homestead, as a part of the distributive share, will be valid before the share is actually set apart. The qualification goes to the right of an election to take the distributive share during such occupancy, and authorizes it. She may elect by having the distributive share set apart "or otherwise make an election." The right of occupancy continues until the homestead is otherwise disposed of. Code, section 2007. It is not so disposed of as to defeat the right of occupancy until the distributive share is set off. Code, section 2008. We think no case is to be found in which it is held that the law so ties the hands of a survivor, entitled to homestead rights, that he or she may not so contract with reference to a distributive share that the homestead right may be defeated. See *Small v. Wicks*, 82 Iowa, 744. In *Darrah v. Cunningham*, 72 Iowa, 123, it is held that an election in a will, and by declarations during occupancy, would not so defeat the homestead character as to render it liable for debts. That case cites *Burdick v. Kent*, 52 Iowa, 583, and *Bradshaw v. Hurst*, 57 Iowa, 745, both of which have reference to homestead property being liable for debts. *Mobley v. Mobley*, 73 Iowa, 654, is not of a different import, but is determined upon the authority of the last cited cases. The holding in *Schlarb v. Holderbaum*, 80 Iowa, 394, does not support the conclusion claimed by the appellee in this case. The only case to be relied upon is that of *McDonald v. McDonald*, 76 Iowa, 137, which was expressly modified in the *Egbert* case so as to permit an election in other ways than by an actual setting off of the distributive shares. We attach great importance to the contractual relation of the parties in this case, which relation existed, it is true, in the *McDonald* case,

but in that case there was no election to take the distributive share, except in so far as one should be inferred from the fact of making the mortgage, while in this case there is the same inference, followed by an express declaration of record to that effect, from which the finding may be made that the election was in pursuance of the contract. A rule of law that would permit such an election to be withdrawn with an effect, if not a purpose, to defeat the obligations of contract, would be violative of every principle of natural justice. No equitable thought is suggested in support of a rule permitting the widow to thus prove false to her obligations, but only the force of a claimed precedent in some of the cases cited. We are clear that the adjudications, considered together, support no such rule.

Some misapprehension arises from different statements as to the right of occupancy of the homestead

under the provisions of Code, sections 2007, 2008. It does not follow from the language of those sections, nor the holdings thereunder, that an election may not be made to take the distributive share before it is actually set off. In the *Egbert case*, as well as others, the thought is prominent that the right to the distributive share is primary; that the election should be as to the homestead, and that a right to a distributive share is only defeated when a homestead election is made; but, of course, there may be an act indicating an election to take the distributive share, and that is what is meant when the term is used, and not that such an election is necessary to secure it. In this case there was this express election to take the distributive share, which proves unmistakably that at that time there was no election to take the homestead, and that the then occupancy was only during the time it was being "disposed of according to law;" that is, being set off. Conceding that, in the absence of her contract, she might

2. —: dower:  
homestead:  
election.

recede from it, and resume or adopt a permanent occupancy of the homestead, she should not be permitted to do so in violation of her voluntary obligation to the contrary. Our conclusion is that the respective shares should be confirmed on a basis of a distributive share to the widow, and not on that of a homestead right, and partition be had accordingly.

By a stipulation, the case, as to other questions involved in this appeal, is to stand affirmed, and a final decree is to be entered in the district court in accord with this opinion, and it is remanded for that purpose. **MODIFIED AND AFFIRMED.**

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**EMMA B. NICHOLS, Appellee, v. A. W. THOMAS,  
Appellant. .**

1. **Liquor Nuisance: INJUNCTION: EVIDENCE.** Evidence that persons in the habit of drinking intoxicating liquors frequented the defendant's premises, that people were seen there intoxicated, that the place had the reputation of being a saloon, and that its general appearance, and the odor therefrom, indicated to passers-by that intoxicating liquors were sold there, *held*, sufficient to support a finding that the defendant was engaged in the illegal sale of intoxicating liquors, although there was no direct evidence that the defendant sold intoxicating liquor, and the defendant testified that the liquor drank upon the premises was brought there by others.
2. ———: ———: **ATTORNEY FEES.** An attorney fee of one hundred dollars for the plaintiff's attorney in such case is not excessive where it appears that the case was vigorously contested, and that four days were required for the hearing, for a preliminary injunction, and for final trial.

*Appeal from Floyd District Court.*—HON. J. C. SHERWIN, Judge.

MONDAY, OCTOBER 16, 1893.

**ACTION** to enjoin a saloon nuisance. There was a decree for the plaintiff, and the defendant appeals.—*Affirmed.*

*J. S. Root*, for appellant.

*Ellis & Ellis*, for appellee.

GRANGER, J.—I. The controversy is as to the sufficiency of the evidence to warrant a finding that the defendant was engaged in the sale of intoxicating liquors contrary to law. It is made to appear that the defendant kept a billiard saloon and sold ginger ale. There is no direct testimony that he sold intoxicating liquor. It does appear that persons in the habit of drinking such liquor frequented his place of business, and people were seen to leave there intoxicated. The general appearance of the place in many respects and the odor therefrom, indicated to passers-by that intoxicating liquors were sold there, and there is evidence that it had the reputation of being such a place. The defendant himself admits that liquor had been drank there, but he says that he did not keep it; that it was brought there by others, and “taken out back.” With the fact established that liquor was drank there, and we are warranted in saying that it was done to quite an extent, to give the place its general reputation and appearance, we are led to believe, though upon quite meager testimony, that the place was maintained as a nuisance. It is hardly probable that persons would purchase liquor elsewhere, and seek out the defendant’s place to drink it and become intoxicated to such an extent as to stamp his place, in the estimation of people, as a liquor saloon, if it was kept exclusively for other purposes. If we are mistaken as to the facts, it is because the defendant has permitted surroundings and a course of conduct consistent with his guilt. We think, as did the district court, that the fact of the nuisance is established.

1. Liquor nuisance: Injunction: evidence.

II. The court allowed an attorney's fee of one hundred dollars, and it is claimed to be excessive. The testimony shows that on a hearing for a preliminary injunction and on the final trial about four days were used, including some preparatory work. The testimony shows that it was worth twenty-five dollars per day. The case seems to have been quite vigorously contested, and in any other case we do not think such a fee would be regarded as unreasonable. The law permits a reasonable fee. The judgment is **AFFIRMED**.

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**IN THE MATTER OF THE ESTATE OF ELIZABETH P.  
CONRAD, Deceased.**

**Life Insurance: POLICY: CONSTRUCTION: DEATH OF BENEFICIARY: INTEREST OF HEIRS.** A policy of life insurance was, by its terms, payable to a beneficiary named therein, or to her "legal representatives," upon the death of the insured; or, if the beneficiary was not then living, to her children, or to their guardian. The only child of the beneficiary died, leaving two children; and thereafter, but before the death of the insured, the beneficiary died. *Held*, that, upon the death of the insured, the insurance did not become a part of the assets of the estate of the beneficiary, but passed to the grandchildren by the law of descent.

*Appeal from Des Moines District Court.*—HON. JAMES D. SMYTHE, Judge.

MONDAY, OCTOBER 16, 1893.

THIS case involves the right of S. E. Nixon and another, who are creditors of the estate of Elizabeth P. Conrad, deceased, to payment of their claims from the avails of a life insurance policy upon the life of the husband of the deceased. The district court decided that said fund did not belong to the estate of the said Elizabeth P. Conrad, and from that decision the claimants appeal.—*Affirmed*.

*A. M. Antrobus*, for appellants.

*Newman & Blake*, for appellee.

ROTHBOCK, J.—The facts necessary to determine the rights of the parties are as follows: On the third day of February, 1877, John Conrad procured from the Connecticut Mutual Life Insurance Company, a paid up policy on his life, for the sum of four hundred and forty-nine dollars. The said policy was in these words:

“This policy of insurance witnesseth, that the Connecticut Mutual Life Insurance Company, in consideration of the representations and declarations made to them in the application for this insurance, and of the sum of one hundred and seventy-five dollars, receipt whereof is hereby acknowledged, do hereby insure the life of John Conrad, (the insured,) for the term of his natural life, in the sum of four hundred and forty-nine dollars, for the sole use and benefit of Elizabeth P. Conrad (the assured), wife of said insured; the sum to be paid at the office of this company in Hartford, Connecticut, to the said assured or her legal representatives, within ninety days after due notice and satisfactory evidence of the death of said insured during the continuance of this policy; or, if the said assured be not then living, the said sum shall be payable as above to her children, or to their guardian, if under age. That this policy shall not be assigned; but the same may be surrendered to this company and discharged at any time by the assured if living, and after her death by the beneficiary hereof, under the statutes of Connecticut.”

At the time the said insurance was effected, Conrad was forty-two years old, and his wife Elizabeth P. Conrad, and one child, named Lilly Conrad, were living. The daughter married one Parsons, on February 2, 1883. She died in February, 1888, leaving two children surviving her. Elizabeth P. Conrad died March

23, 1890. John Conrad died May 4, 1891. All of said persons died intestate. C. B. Parsons was appointed guardian of the children of Lilly Conrad Parsons, deceased, on the third day of June, 1891, and he was appointed administrator of the estate of Elizabeth P. Conrad on July 10, 1891. The insurance company paid the amount of the insurance to the administrator and guardian and he receipted for the same both in his capacity as guardian and administrator. The demands presented by the creditors, and for the payment of which it is claimed the insurance money should be appropriated, are for medical attendance to Elizabeth P. Conrad and for her funeral expenses.

The ultimate question for determination upon the foregoing facts is whether the proceeds of the policy are part of the estate of Elizabeth P. Conrad. If assets of her estate, there can be no doubt that the money is liable for her debts. *Smedley v. Felt*, 43 Iowa, C07; *Murray v. Wells*, 53 Iowa, 256. The district court held that the fund did not belong to the estate of Elizabeth P. Conrad. We think that the holding was right. It is expressly provided in the policy that, if the assured be not living at the time the policy becomes payable, the amount thereof shall be payable to her children. There was no authority to make payment to the administrator of her estate in any event. The clause authorizing payment to "her legal representatives" does not mean payment to their administrator. It contemplates payment to some legal representative appointed by the wife to receive the money for her. There can be no other meaning attached to the expression "legal representatives,"

- because it is expressly provided that, if the assured be not then living, payment shall be made to the children or their guardian. "Legal representative," in the broadest sense, means one who lawfully represents another in any matter whatever. *Anderson's Law Dictionary*, 883. As Mrs. Conrad died before her

husband, and by her death all her interest in the policy was extinguished, the creditors of her estate have no claim upon the fund.

But it is insisted that as there were no children living at the time of the death of Mrs. Conrad, or when the policy became payable, the fund did not pass to the grandchildren, because they are not named as beneficiaries. In such case it should be the policy of the law to dispose of the fund according to the law of descent. The case of *Insurance Co. v. Palmer*, 42 Conn. 60, is in all its essential facts like the case at bar, and it was there held that a transmissible interest vested in the children upon the issuing of the policy, and that the child of the deceased child took by descent the interest of its parent, and was entitled to a portion of the fund which the parent would have received if living.

Counsel for the appellants cites us to the case of *United States Trust Co. v. Mutual Benefit Life Ins. Co.*, 115 N. Y. 152, 21 N. E. Rep. 1025, where, in a case much like that at bar, it was held that the grandchildren did not take any interest in the policy, nor the fund arising therefrom. Our examination of this and other cases cited leads us to a different conclusion. We think that, as the wife was not living when the policy matured, the money due thereon was no part of her estate, and that, as the children were named in the policy as beneficiaries, the fund passed down the line of descent to the grandchildren. It seems to us that this conclusion accords with the spirit of our laws upon life insurance. It is a provision made for the family, and is exempt from the payment of the claims of creditors of the insured. Code, section 1182. As the wife in this case did not live to acquire any right to the fund, it is surely in accord with the intent of the assured that it should pass to the grandchildren by the law of descent.

The judgment of the district court is AFFIRMED.

89	400
105	442

89	400
136	283

**JAMES H. LOVE & COMPANY, Appellees, v. ROSS,  
CRAWFORD & GRAHAM *et al.*, Appellants.**

1. **Sale : WARRANTY : BREACH : DAMAGES.** A contract of warranty on the sale of a stallion provided, that if the stallion was not a reasonably sure foal getter the vendee could return him, in as good condition as he was then in, and the vendor would exchange him for another stallion, giving or receiving the actual difference in the value of the two animals. The horse having died before the result of his services could be known, *held*, that the return of the horse in the event of a breach of the warranty was optional with the vendee, and that his failure to return him would not defeat the vendee's right to recover damages for a breach of the warranty.
2. ——— : ——— : ——— : ——— : **MEASURE OF.** The measure of the vendee's damages in such case is the difference between the value of the horse as he was and as he was warranted to be, and the expense incurred by reason of his not being as warranted. The difference in the amount realized in the services of the horse, and what would have been realized had the horse been as warranted is not recoverable.

*Appeal from Dallas District Court.*—HON. J. H. APPLE-  
GATE, Judge.

MONDAY, OCTOBER 16, 1893.

ACTION upon two promissory notes aggregating eight hundred dollars. The defendant answered, admitting the execution of the notes, and alleging by way of counterclaim the following: That about March 21, 1888, they purchased from the plaintiff, for breeding purposes, a stallion at the agreed price of one thousand, five hundred dollars. That the plaintiffs warranted said horse in writing, as per copy attached, "to be a reasonably sure foal getter under favorable circumstances," and that said horse was not as warranted. They alleged that the horse was of no value; that, if it had been as warranted, he would have been of the value of one thousand, five hundred dollars, which amount

they ask to recover. They also alleged that they kept the horse during the season of 1888 at an expense of two hundred and fifty dollars, which was lost to them by reason of his condition, and which they ask to recover. They also ask to recover six hundred dollars, as the difference in what they would have realized from the services of the horse during the season of 1888 had he been as warranted and the amount actually realized from his services. The plaintiff replied admitting the sale of the horse as alleged, and denying every other allegation in the counterclaim. Verdict and judgment for the plaintiffs for one hundred and forty-eight dollars and seventy-eight cents. Both parties appeal. The defendants, having first perfected their appeal, are designated as appellants.—*Affirmed*.

*Shortley & Harpel*, for appellants.

*White & Clarke*, for appellees.

GIVEN, J.—I. We first consider the question presented by the plaintiffs on their appeal. The written contract set out in the defendant's answer

1. SALE: warrant-  
ty: breach:  
damages.

contains the following:

“ALBIA, IOWA, 3-21, 1888.

“In having this day sold to W. F. Graham, G. H. Ross and John Crawford the English Shire, Yorkshire Lad stallion for one thousand, five hundred dollars, it is therefore agreed that said stallion is warranted to be a reasonably sure foal getter under favorable circumstances, and in default thereof said W. F. Graham, C. H. Ross and John Crawford can return said stallion to us here at Albia, in as good condition as he is now in, and we will exchange said returned stallion for another, giving or receiving the actual difference of the value of the two animals. In case of a disagreement as to the actual difference between the two horses to be exchanged it shall be left to three disinterested parties, each party

interested choosing one party and the two so chosen shall select the other, and the decision of the three shall be final."

The defendants state in their answer that before sufficient time had elapsed to reveal the fact that the horse was not as warranted he died, thereby rendering it idle and unnecessary to return the said horse.

The plaintiffs contend that the defendants were not entitled to recover damages upon the third count of their counterclaim, for the reason that the horse, on the discovery of the alleged breach of warranty, was not returned to the plaintiffs as provided in said contract. It is contended that it is competent for the parties to provide by contract that a particular course shall be pursued in case of a breach of the contract of warranty, and that, where parties have thus agreed upon the course that shall be taken, and the consequences that shall follow that course, these consequences will be enforced to the exclusion of the rights which the parties might have, in case no course was agreed upon.

In *King v. Towsley*, 64 Iowa, 78, it is said, "It is well settled in this state that when the parties have not stipulated as to the course which shall be taken in case of the failure of the warranty, the vendee has his election either to sue on the warranty or to rescind the contract by returning the property and bringing his action for the money received by the seller. It is competent, however, for the parties to provide by contract that a particular course shall be pursued on the failure of the warranty." See, also, *Russell v. Murdock*, 79 Iowa, 105.

It is also contended that under this agreement the defendants are not excused from returning the horse because of his death. There seems to be no question but that the horse died before the results of his services during the season of 1888 could be known; therefore his return on the discovery of the breach of

warranty was impossible. Whether, if the agreement to return the horse in case he was not as warranted was absolute, the defendants would be excused from returning him because of his death, we need not determine, as, in our opinion, this agreement is not absolute, but optional. The contract is that, in case of default, the defendant "can return said stallion," leaving to them the discretion which the law gave. If the horse was not as warranted, the law accorded to the defendants the right to rescind the contract of purchase by returning the horse, and to recover the price paid. The only change that this contract makes upon what, in its absence, would be the legal rights and liabilities of the parties, is that, in case the defendants did return the horse, they were bound to receive another in exchange upon the terms stated. They could not, under this agreement, rescind the contract, and recover the price paid. The defendants had the right to retain the horse, and to recover damages for the breach of the warranty, or to return him, and receive another horse in exchange, upon the terms stated. The failure to return the horse does not defeat the defendants' right to recover damages for a breach of the warranty.

II. The single question presented on the defendants' appeal is, whether they are entitled to recover upon their claim for the difference in the amount realized from the services of the horse during the season of 1888, and what they would have realized had the horse been as warranted. Their claim to recover the difference in the value of the horse as he was and as he was warranted to be as their general damage was submitted to the jury; also their claim for special damages on account of expenses in caring for and keeping the horse. It is well settled that special damages may be allowed in proper cases in addition to general damages. 2 Greenleaf on Evidence, section 254; *Joy v. Bitser*,

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measure of.

77 Iowa, 73, 78. In *Short v. Matteson*, 81 Iowa, 638, a case similar in its facts to this, this court held that expenses like those claimed and allowed in this case were the proximate result of the breach of the warranty and recoverable as special damages. The right to recover special damages is not questioned; but the query remains, are the damages in question within the rule. Damages "should be precisely commensurate with the injury, neither more nor less." 2 Greenleaf on Evidence, section 253. These defendants have been allowed as their general damage, the difference between the value of the horse as he was and as he was warranted to be, and the expenses to which they were put by reason of his not being as warranted. This makes them entirely whole, "neither more nor less." To illustrate, they purchased the horse, which, if as warranted, was worth one thousand, five hundred dollars. He was not as warranted; therefore only worth, say one thousand dollars. The defendants retained the horse, and recovered the difference, five hundred dollars; also their expense in keeping the horse. To allow them what the horse would have earned if as warranted over what he did earn is to give them the earnings of a one thousand, five hundred dollar horse, when in fact they only paid the real value, one thousand dollars, for him.

Another reason why the damages in question should not be allowed is that they are too remote and speculative. The profit to be derived from the horse did not depend solely upon his condition, but also upon the condition and treatment of the mares, and their liability to disease and death. See *Connoble v. Clark*, 38 Mo. App. 476.

The judgment of the district court is affirmed on both appeals. **AFFIRMED.**

**THE STATE OF IOWA, Appellee, v. H. M. BELVEL,  
Appellant.**

1. **Indictment: GRAND JURY OF LESS NUMBER THAN REQUIRED BY LAW: WAIVER OF OBJECTION.** Where, in a criminal cause, the court has jurisdiction of the person of the defendant and of the offense charged, an indictment found by a grand jury composed of five persons only, in a county where the law requires that such jury shall be composed of seven persons, is not fatally defective, and a failure to object thereto upon such ground, until after a plea of guilty and judgment thereon, will constitute a waiver of such defect. (KINNE, J., *dissenting*.)
2. **Change of Venue: DISCRETION OF DISTRICT COURT.** The allowance of a change of venue in a criminal cause on the ground of excitement and prejudice on the part of the people of the county is a matter within the jurisdiction of the district court, and a showing on the part of the state, by counter affidavits, to the effect that there was but little discussion in the county in regard to the merits of the case, and that there was neither excitement nor prejudice against the defendant, is sufficient to support its action denying a change.
3. **Continuance: ABSENCE OF WITNESSES: COUNTER AFFIDAVITS: MOTION TO STRIKE.** While a resistance to a motion for a continuance on the ground of the absence of witnesses can not be supported by affidavits to contradict statements contained in the affidavits filed in support of such motion as to what the testimony of the absent witnesses will be, it is competent to show want of diligence to procure the testimony desired. And where a defendant in a criminal cause moved to strike all of the affidavits filed by the state in resistance to a motion for a continuance, portions of which only were objectionable, *held*, that the motion was properly overruled.
4. —: —: **DILIGENCE: GOOD FAITH.** An application for a continuance on the ground of the absence of witnesses should be overruled where it appears not to have been made in good faith, and that the applicant has not used due diligence to procure the testimony desired.
5. **Libel: FINE: AMOUNT.** A fine of five hundred dollars, in a case of criminal libel, is not excessive, where it appears that the libel was grossly offensive, and that its publication was without any provocation that could be justly urged in mitigation of the punishment imposed.

89	405
92	543
89	405
103	730
103	728
89	405
1129	104

*Appeal from Taylor District Court.*—HON. H. M. TOWNER, Judge.

MONDAY, OCTOBER 16, 1893.

THE defendant was convicted of the crime of libel. From the judgment, which required him to pay a fine of five hundred dollars and costs, he appeals.—*Affirmed.*

*John F. Martin, Chas. Thomas, Mark Atkinson, Chas. Mackenzie, and Dale & Brown,* for appellant.

*John Y. Stone,* Attorney General, and *Thos. A. Cheshire,* for the State.

ROBINSON, C. J.—The indictment upon which the defendant was convicted was presented by the grand jury of Taylor county on the fifth day of March, 1892. It charges that on or about the eighteenth day of February, 1892, in the county named, the defendant “unlawfully and maliciously, to injure the good name and character of G. L. Finn, and to expose him to public hatred and contempt, and deprive him of public confidence, and to bring him into public scandal and disgrace, did, on the said eighteenth day of February, 1892, write and publish, and cause to be written and published in said county, in the *Southwest Democrat*, a newspaper published in said county, a false, scandalous, malicious, and defamatory libel, in the form of a letter. \* \* \*” The matter alleged to be libelous is set out at length, and the sense in which it was written and published is specified.

On the twenty-seventh day of April, 1892, the defendant filed a demurrer to the indictment, which was overruled. The defendant then petitioned for a change of the place of trial on the ground of excitement and prejudice on the part of the people of Taylor

county. The petition was supported by affidavits, and was overruled. A motion for a continuance was made, based on the absence of certain witnesses. It was supported by affidavits, and was resisted by counter affidavits. A motion of the defendant to strike the counter affidavits from the files on the ground that they are not allowable, was overruled. Some of the persons whose affidavits were used were examined in open court, and the application for a continuance was overruled on the fifth day of May, 1892. Thereupon the defendant entered the plea of guilty, and judgment was rendered as has been stated. On the twenty-sixth day of the same month an appeal was taken to this court. On the eleventh day of April, 1893, the defendant filed in the district court a paper entitled a "motion and petition to vacate judgment," in which he asked that the judgment rendered be vacated, that he have leave to withdraw his plea of guilty, and that the indictment be quashed. The application was based upon the following grounds: *First.* An official bulletin of the superintendent of the federal census, issued on the twenty-first day of July, 1891, showed that the population of Taylor county was more than sixteen thousand inhabitants. *Second.* The law requires that in counties having more than sixteen thousand inhabitants the grand jury shall be composed of seven members, and, for the purpose of selecting them, that twelve jurors shall be drawn. *Third.* The grand jury which returned the indictment in question was composed of but five members, and for the purpose of selecting them but eight jurors were drawn. On the twenty-fifth day of April, 1893, the state and the defendant having been duly represented by attorneys, the motion was overruled. The petition was dismissed, and judgment was rendered against the defendant for costs. Two days later he took an appeal from that judgment. The two appeals are submitted together for the determination of this court.

I. Section 231 of the Code, as amended by chapter 42 of the Acts of the Twenty-first General Assembly, provides that in counties having more

1. INDICTMENT:  
grand jury of  
less number  
than required  
by law: waiver  
of objection.

than sixteen thousand inhabitants, the grand jury shall be composed of seven members. Section 241 of the Code, as amended, provides that when the grand jury is to be composed of seven members, twelve jurors shall be drawn from which to select them. The population of Taylor county, as shown by the federal census of the year 1890, is sixteen thousand, three hundred and eighty-four, and it is not disputed that the grand jury which presented the indictment in question should have been composed of seven members, and that twelve jurors should have been drawn for it. See *State v. Braskamp*, 87 Iowa, 588. The record submitted shows, that it was in fact composed of but five members, and that but eight jurors were drawn for it. The state contends, however, that, as the defendant failed to make the objections now presented before the judgment on his plea of guilty was rendered, they were waived, and that the first appeal deprived the district court of jurisdiction to determine the motion and petition on their merits. The defendant contends that the defect goes to the jurisdiction of the district court, and that want of jurisdiction can not be waived, but will be considered at any time when it comes to the knowledge of the court, even though not urged by either party.

That the general rule is as claimed by the defendant, has been settled by numerous decisions. *City of Lansing v. Chicago, M. & St. P. R'y Co.*, 85 Iowa, 215; *Orcutt v. Hanson*, 71 Iowa, 514, 517; *Cerro Gordo County v. Wright County*, 59 Iowa, 485; *Groves v. Richmond*, 53 Iowa, 570; *St. Joseph Manufacturing Company v. Harrington*, 53 Iowa, 380; *District Township of Viola v. District Township of Audubon*, 45 Iowa, 104; *Walters v. The Mollie Dozier*, 24 Iowa, 192, 199; *Burlington*

*University v. Executors of Stewart*, 12 Iowa, 442; *Dicks v. Hatch*, 10 Iowa, 380, 384. In most of the cases cited it appeared that the trial court did not have jurisdiction of the subject-matter of the action, but that is not true in this case. The district court had jurisdiction of the offense charged in the indictment and of the defendant. The real question we are required to determine is, whether the fact that the grand jury was composed of but five members, and the further fact that but eight jurors were drawn for it, were defects so serious that they could not be waived.

Section 4260 of the Code authorizes a challenge to the panel, before indictment, when the jurors were not appointed, drawn, or summoned as prescribed by law. The defendant was not held to await the action of the grand jury by the order of any committing magistrate, and had no opportunity to object to the grand jury until after the indictment had been presented. But subdivision 5 of section 4337 of the Code provides for a motion to set aside an indictment, and requires that it be sustained when it appears "that the grand jury were not selected, drawn, summoned, impaneled, or sworn as prescribed by law." Section 4339 of the Code provides, that the ground stated shall not be allowed to a defendant who has been held to answer before indictment, thus in effect clearly providing for a waiver of the right of challenge when founded upon any of the defects contemplated by the subdivision quoted. *State v. Gibbs*, 39 Iowa, 318, 319; *State v. Hart*, 29 Iowa, 268, 269. Electors of the state only are qualified to act as jurors. Code, section 227.

But a person held to await the action of the grand jury waives his right to object to an indictment presented against him by a grand jury of which an alien was a member, by failing to challenge the alien before the jury was sworn. *State v. Gibbs*, 39 Iowa, 319. In *State v. Reid*, 20 Iowa, 413, 422, it appeared that the

grand jury had submitted its final report, and been discharged. Afterwards, but during the same term of court, it was again summoned and impaneled, and it then found the indictment on which the defendant was convicted. It was objected that the court had no power thus to organize a grand jury. This court held that it had, and also that the objection was not taken in due time, because not made before a plea to the indictment was entered. It is clear, under the statute and the decisions, that the defendant waived his right to object to the panel because a sufficient number of jurors were not drawn for it.

It is more difficult to determine what effect should be given to the acts of a grand jury composed of but five jurors when seven are required by law. Section 11 of article 1 of the Constitution of this state provides, that no person shall be held to answer for any criminal offense higher than those in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days, "unless on presentment or indictment by a grand jury. \* \* \*" Section 15 of article 5 of the Constitution adopted in the year 1884 is as follows: "The grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly may by law provide, or the general assembly may provide for holding persons to answer for any criminal offense without the intervention of the grand jury." Acting under that section, the general assembly amended section 231 of the Code, and provided that in counties having more than sixteen thousand inhabitants "the grand jury shall be composed of seven members."

The defendant contends that this provision is mandatory, and that his right to have his case considered by a grand jury of seven members is guaranteed by the constitution. It is true that the right is guaranteed as claimed, but the obligation to provide a grand jury of

seven members in certain cases is no greater than is that to furnish a trial jury of twelve. The constitution provides that the "right of trial by jury shall remain inviolate." Section 9, article 1. That means a jury of twelve persons; and the general assembly can not require the parties to an action to accept a jury containing a smaller number, excepting in inferior courts. *Eshelman v. Chi., R. I. & P. R'y Co.*, 67 Iowa, 296; *Kelsh v. Town of Dyersville*, 68 Iowa, 137. It was said in *Cowles v. Buckman*, 6 Iowa, 160, 162, that a party may waive his right to a trial by jury of twelve persons, and consent to a trial by one containing a less number. See, also, *State v. Groome*, 10 Iowa, 308, 315. And in civil actions he may wholly waive a jury. Code, section 2814. In *Wilkins v. Treynor*, 14 Iowa, 391, 393, it was said that "the right of trial by jury, guaranteed by the constitution, may be lost or waived by the act or covenant of a party. This right is not an attribute, or inalienable in its nature and character, but rather a privilege that may be waived or forfeited." It was, therefore, held that a party in default, who nevertheless had the right to appear in the case, had lost his right to demand a trial by jury. See, also, *Clute v. Hazleton*, 51 Iowa, 355, 359; *Henry Buggy Co. v. Patt*, 73 Iowa, 485, 489; *In re Hooker*, 75 Iowa, 377, 380. A jury may be waived by failing to demand it at the proper time. *Davidson v. Wright*, 46 Iowa, 383. See, also, *Hawkins v. Rice*, 40 Iowa, 435, 437. It was held by a majority of this court in *State v. Carman*, 63 Iowa, 130, that a defendant in a criminal action triable on indictment can not waive a trial by jury; and that decision was followed in *State v. Larrigan*, 66 Iowa, 426. But in *State v. Kaufman*, 51 Iowa, 578, it was said to be the settled doctrine of this state, that a defendant in a criminal action may waive a statute enacted for his benefit, and it was held to be competent for him to consent to a trial by eleven jurors. The case of *State*

*v. Ostrander*, 18 Iowa, 435, 438, was decided under a statute which fixed the number of persons required to constitute a grand jury at fifteen, and required the concurrence of twelve to find an indictment. The defendant, before pleading, had filed a motion to quash the indictment, because found by a grand jury consisting of only fourteen members. It appears that a challenge to one member of the panel had been sustained, and that but fourteen members had acted upon the indictment. It was held that the indictment was good. The court made prominent the fact, that, although more than twelve persons were required to constitute a grand jury, yet "from the earliest authorities down it is shown that a presentment by twelve is good, although no more than twelve be impaneled, or, if more are impaneled, although all the other jurors dissent." See, also, *State v. Shelton*, 64 Iowa, 333, 335. The case of *Norris' House v. State*, 3 G. Greene, 513, 514, in which this court held an indictment presented by a grand jury of fourteen members, one having been discharged, to be illegal, was referred to, and apparently doubted, although it was not overruled. In that case objection was made to the indictment by answer. It had been urged that it was made too late, because not made before the grand jury was sworn, under a statute which provided that no objection could be interposed by a defendant to a grand jury for any cause of challenge after they were sworn. In commenting upon that provision, this court said, that it must be confined to such defendants as had an opportunity to interpose the objection therein allowed, but that persons who had been held to await the action of the grand jury, by failing to make their objection before it was sworn, would be "forever barred from objecting afterward." In *People v. Petrea*, 92 N. Y. 128, 143, it was held that no constitutional right of the defendant was invaded by holding him to answer to an

indictment presented by a grand jury not selected in pursuance of a valid law, but selected under color of law and semblance of legal authority. It was said that "an indictment was found by a body drawn, summoned, and sworn as a grand jury, before a competent court, and composed of good and lawful men. This, we think, fulfilled the constitutional guaranty." In *State v. Felter*, 25 Iowa, 67, 71, it was said that "courts do not favor objections based upon irregularities respecting preliminary matters and proceedings, while they will sedulously guard all rights secured to the accused while undergoing the ordeal of a trial which is to be decisive of issues momentous and weighty alike to the defendant and to the state."

Section 231 of the Code, as amended, provides, that the grand jury, in counties having a population not exceeding sixteen thousand, shall be composed of five members, and that in counties having a greater population it shall be composed of seven members. Section 241 provides, that when the grand jury is to be composed of five members only, eight jurors shall be drawn for it, and that when it is to be composed of seven members the number of jurors drawn shall be twelve. Section 4291 provides, that an indictment can not be found without the concurrence of four grand jurors when the grand jury is composed of five members, and not without the concurrence of five grand jurors when it is composed of seven members. When it is required to consist of five members, and a challenge to one has been sustained, a valid indictment may be presented by the remaining four. *State v. Billings*, 77 Iowa, 417, 421. In this case the indictment was presented by a grand jury which would have fully met the requirements of the law, had the population of the county been four hundred less. It was presented by five jurors acting as the grand jury, or by as many members as would have been required in

any event to concur in the finding of the indictment. No constitutional guaranty was violated by impaneling a grand jury of five persons. The defendant could have interposed the objections he now urges before pleading to the indictment, and no reason for his failure to do so is shown. We are of the opinion that, under these circumstances, the indictment can not be regarded as void, and that the defects of which the defendant now complains were waived by a failure to take advantage of them before pleading to the indictment. The court had jurisdiction of the case, and the defendant had an opportunity to make defense on the merits to the charge against him.

II. Complaint is made of the refusal of the district court to change the place of trial on the application of the defendant. It is erroneously stated in argument that no affidavits were filed on the part of the state denying the existence of the prejudice alleged. There was a showing to the effect that there was but little discussion in Taylor county in regard to the merits of the case, and that there was neither prejudice nor excitement against the defendant, and nothing to prevent him from having a fair trial in the county. Applications of the nature of that under consideration are to be decided by the trial court, in the exercise of a sound discretion. Code, section 4374. We think the action of the court in denying the change asked is fully supported by the counter showing made by the state.

III. It is said the court erred in not sustaining the motion of the defendant to strike from the files the affidavits filed by the state in resistance of the application for a continuance. Affidavits can not be used to contradict statements contained in affidavits filed in support of an application for a continuance as to what the testimony of the absent witnesses will be. *State v.*

2. CHANGE of  
venue: discre-  
tion of district  
court.

8. CONTINUANCE:  
absence of  
witnesses:  
counter affida-  
vits: motion to  
strike.

*Dakin*, 52 Iowa, 395. But counter affidavits for other purposes, as to show want of diligence to procure the testimony desired, are permissible. *State v. Murdy*, 81 Iowa, 603, 605; *State v. Rainsbarger*, 74 Iowa, 196, 199. Portions of some of the affidavits sought to be stricken out were objectionable, but there was no attempt to designate those portions. The motion was based upon the theory that counter affidavits were not permissible for any purpose. Each of the affidavits at which the motion was aimed contained something which it was proper to urge against the application, and the motion was, therefore, rightfully overruled.

IV. We are also of the opinion that the action of the district court in overruling the motion for a continuance is fully justified by the record presented. The motion was based on the absence of certain witnesses, whose testimony was alleged to be material for the defendant. Counter affidavits showed in regard to one of those witnesses that the defendant not only did not attempt to secure her attendance in good faith, but that by himself and his attorney he made extraordinary and unjustifiable attempts to prevent it after she had been required to appear by the state. She was present at court before the continuance was denied, and the defendant then relied upon the absence of six witnesses, whose names are given, as ground for a continuance. It appears that the defendant and others were examined in open court in regard to the diligence used to obtain the attendance or testimony of those witnesses. That examination and the affidavits filed disclosed facts which justified the court in concluding that the application for a continuance was not made in good faith, and that the defendant had not used due diligence to procure the testimony which he claimed to need. Therefore there was no sufficient reason shown for granting the application.

4. —: —: dili-  
gence: good  
faith.

V. It is said that the fine imposed is excessive. The libel was grossly offensive, and, so far as the record shows, was without any provocation which can justly be urged in mitigation of the punishment. We can not say that the amount of the fine exceeds the demands of justice. We have examined the entire record with care, but without finding any ground for interfering with either of the judgments of the district court. They are, therefore, **AFFIRMED**.

KINNE, J. (*dissenting*).—I concur in the opinion of the majority of the court, except as to the holding that the indictment was not void, and that the defendant has waived his right to object thereto. As to these conclusions I dissent. I am not unmindful that it is the policy of our law, as is evidenced by statute and the decisions of this court, to require that mere irregularities and informalities touching the manner of impaneling the grand jury and the like must be taken advantage of before pleading to the indictment. I can not agree, however, that the original organization of a grand jury, composed of a less number of persons than the constitution and laws require, is such an irregularity as is contemplated, or as may be waived by any act of the defendant. It is conceded that in this case the grand jury which found the indictment was composed, when it was impaneled, of but five persons, whereas in the county of Taylor it required seven persons to constitute a legal grand jury. It will be observed that this is not a case where the grand jury was, in the first instance, made up of the legal number, and afterwards reduced by challenge or otherwise. A grand jury originally composed of a less number of persons than is provided by the constitution and laws is in fact not a grand jury at all. Such a body possesses no more power than any other five men who should assume to act as a grand jury. Nor can it be said that the fact that they are

impaneled by the lawfully constituted authorities will validate their illegal organization. The jurisdiction of the trial court is obtained only by virtue of an indictment found and returned by a grand jury. If, then, there is a fatal defect in the organization of the body which must find the indictment, it renders void all subsequent proceedings. It is not a mere irregularity which can be cured or waived, but an essential matter which avoids an indictment found by the body thus illegally constituted.

This question has never been decided in this state. It is an important one. If the doctrine of the majority opinion is to prevail, what is to prevent the finding of an indictment, under color of law, by any body of men greater or less than is provided for by our constitution and laws, and the trial of a defendant thereon in case he fails to make timely objection thereto? Thus may the absolute guaranty of the constitution and the protection which the law affords to the citizen charged with crime be abrogated and annulled because of a failure of the defendant to insist upon his legal rights. Such a doctrine carries the law of waiver, as applied to persons on trial for a crime, to an unwarranted extent. The statutes of Florida require that fifteen persons shall be drawn to serve as grand jurors. In *Gladden v. State*, 12 Fla. 566, it appeared that only fourteen persons were thus drawn. No error was assigned by the plaintiff. The court said: "From a careful inspection of the first page of the record we find only fourteen persons were drawn to serve as grand jurors during the term at which the indictment was found. The statute regulating the organization of grand juries can not, by any known rule of construction, be held to authorize this; and, while no such error is assigned by the plaintiff, yet it is apparent upon the record, and, this being a capital crime, the court can not pass it by without notice. No man should be tried for a capital crime upon an indict-

ment of this character." It was held that there must be fifteen grand jurors on the panel as originally drawn, and that the error vitiated all the subsequent proceedings in the case. In *Brannigan v. People*, 3 Utah, 489, 24 Pac. Rep. 767, it was held that, where a grand jury of seventeen men was impaneled, and the statute required that the grand jury should consist of "twenty-four eligible men to serve as grand jurors," and that "said twenty-four men shall constitute a grand jury," an indictment returned by a grand jury organized with seventeen members was void. It was also held that it was not too late after the verdict to look into the record, when the indictment by which the prisoner was charged was found by an unlawful grand jury. In *Finley v. State*, 61 Ala. 201, 205, it is said: "But if its records affirmatively disclose that a body of men has been organized as a grand jury, in violation of the statutes which prescribe the mode of organizing such a jury, clothed with the powers of making presentments which operate as criminal accusations against the citizen, all the acts of that body must be pronounced void; no solicitation or laches on the part of the accused can cure the illegality. It would be ground of motion in arrest of judgment, and, if no such motion is made, of assignment of error in an appellate tribunal; and, if not assigned, it is of that class of errors this court must notice in obedience to the statute, and 'render such judgment on the record as the law demands.'" As the indictment proceeded from and was the act of a body of men organized as a grand jury in violation of law, the judgment of conviction was reversed. In *Lott v. State*, 18 Tex. App. 627, an indictment for burglary found by a grand jury composed of thirteen, instead of twelve, persons was held by the lower court not such an error as could be taken advantage of by a motion in arrest of judgment. The court of appeals, while holding that the ground of the motion was one not provided

by the statute, said: "This exclusion of other grounds could not, however, extend to the extent of depriving the defendant of a constitutional right, nor to the extent of conferring jurisdiction inhibited by the constitution.

\* \* \* If he is tried in a court having no jurisdiction, he may interpose this objection to the proceeding at any stage thereof, and in any form. \* \* \* Our conclusion is that the matter presented by the motion in arrest of judgment is fundamental, and reaches to the very foundation of the prosecution. It shows that the court in which this trial and conviction were had was without any jurisdiction of the case. \* \* \* Such being the case, it matters not in what manner, or at what stage of the proceedings, this want of jurisdiction is presented. If presented for the first time on this appeal, it would be held fatal to the conviction; or, if it affirmatively appeared from the record that the defendant had been convicted of a felony without being indicted therefor by a grand jury, we would set aside the conviction and dismiss the prosecution for want of jurisdiction in the trial court, although the defendant had not, in any manner, made the objection."

It is not profitable to pursue this inquiry further. The importance of the question presented seemed to justify, on my part, a brief statement of the grounds of my dissent. I am of the opinion that the failure to impanel a legal grand jury was an error fatal to the jurisdiction of the trial court, and that it was an error of a grave character, and as to a matter absolutely essential to jurisdiction, and hence could not be waived by any act, or failure to act, on the part of the defendant. In as much as the jurisdiction of the trial court can only be based upon an indictment found by a grand jury legally organized, and as the indictment in this case was not found by such a body, no conviction can be based thereon; and the question of the court's jurisdiction in such a case can be raised at any time, and in any man-

ner; and when such want of jurisdiction appears, no matter how, it is fatal. For the reasons given, the judgment below should be reversed.

**LUELLA B. LOWE, Administratrix, Appellee, v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY Company.**

1. **Appeal: ERROR WITHOUT PREJUDICE: INSTRUCTIONS TO JURY.** The fact that the statement of the issues in a court's charge to the jury might properly have been made more specific, is not ground for the reversal of a judgment on appeal, where it appears that the appellant has not been prejudiced by reason of such error.
2. **Personal Injury: CONTRIBUTORY NEGLIGENCE: RULES OF RAILROAD COMPANY: WAIVER.** As the plaintiff's intestate, a brakeman on the defendant railroad, in the performance of his duty, stepped onto a railroad track between slowly moving freight cars, for the purpose of uncoupling them, the engineer, without orders, gave the cars a "kick," and the plaintiff's intestate was thrown under the wheels and killed. A rule of the defendant declared that "getting in between cars in motion to uncouple them" was in violation of duty, and was strictly prohibited. *Held*, that evidence that it was the custom of brakemen on the defendant's road to go onto the track, and between cars, when in motion, for the purpose of coupling and uncoupling them, was properly admitted for the purpose of showing a waiver of the above rule by the defendant, as alleged by the plaintiff, and that such practice, being open and notorious, and having existed for some time, the defendant's officers would be presumed to have notice of it.
3. **Master and Servant: UNDISCLOSED INTENTION OF EMPLOYER: EVIDENCE.** Evidence of the intention of the conductor of the freight train, in such a case, as to whether the deceased should uncouple the car in question, and what he proposed to have done in relation to such car, uncommunicated to the deceased, is not admissible.
4. **Railroads: INJURY TO BRAKEMAN: CONTRIBUTORY NEGLIGENCE: EVIDENCE.** The conductor of the train, on which the plaintiff's intestate was employed as brakeman, had received a telegram before reaching the station where the accident in question occurred, to set out the car uncoupled by the deceased, and, after reading the same, said to the brakemen, "we will set out that head stock car." It was not the special duty of any particular member of the train crew to place cars on the side track, but upon the arrival of the train at the station the conductor and two of the brakemen proceeded to unload freight, and the deceased, without special orders, proceeded with the engineer to set out the car in question, that car with five others being

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90 866  
89 420  
94 387  
89 420  
96 708  
98 212  
98 919  
89 420  
117 674  
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127 34  
89 420  
129 363  
89 420  
131 28  
89 420  
138 276  
89 420  
144 341

uncoupled from the train for that purpose. After the switch had been thrown, and the signal given to back, but while the cars were moving slowly, the deceased went between the cars to uncouple the stock car. He might have uncoupled the car before he threw the switch, or after they had passed upon the side track, and in either case the cars would not have been moving, but that was not the usual way of doing, and would have required more time, and, under the rules of the company, there was but nine minutes' time, after the arrival of the train at the station, in which to unload freight, set out the stock car on the side track, return with the engine to the main track, and side track the train, so as to leave the main track clear for the passenger train. *Held*, that the finding of the jury, that the deceased was not guilty of negligence contributing to his injuries was supported by the evidence.

5. ———: NEGLIGENCE: EVIDENCE. Although at the time of the accident the train was under the orders of the deceased, the evidence showed that the engineer, knowing that the deceased was between the cars, without orders, and without warning, gave the cars a "kick." *Held*, that the defendant's negligence was established.
6. ———: ———: INJURY CAUSING DEATH: MEASURE OF DAMAGES. The measure of damages recoverable in such case, is the pecuniary loss to the estate of the deceased, caused by his death, in view of his age, occupation, the wages he was receiving, his condition of health, and his ability, if any, to earn money. The recovery is not limited to such sum as, placed at legal interest for the time of the deceased's expectancy of life, would produce the amount he would have accumulated over and above his liabilities at his death, had he lived out his expectancy of life.
7. ———: ———: ———: DAMAGES: VERDICT. A verdict of five thousand dollars for the negligent killing of a brakeman on a freight train, who at the time was twenty-five years of age, in good health, and earning fifty-five dollars a month, all of which sum was consumed in the support of himself and family, is not excessive.

*Appeal from Osceola District Court.*—HON. SCOTT M. LADD, Judge.

MONDAY, OCTOBER 16, 1893.

ACTION to recover damages for a personal injury. From a verdict and judgment for the plaintiff, the defendant appeals.—*Affirmed*.

*Swan, Lawrence & Swan*, for appellant.

*Argo, McDuffie & Argo*, for appellee.

KINNE, J.—The plaintiff's claim, as set forth in her petition is substantially this: That she is the administratrix of the estate of one Channing Lowe, deceased; that the defendant was, on and prior to November 14, 1891, operating a line of railroad through the town of Ashton, in this state, at which point it had a main line and certain switches and side tracks; that at that time and place it was frequently the custom and practice of the defendant, when its trains were behind time, and it desired to detach certain of its cars from those in use on the main line and place them on a side track, to order, direct and require certain of its servants acting as brakemen to open one of the switches connecting with its main line, and then, while said cars and engine were in motion, to step upon its track between the cars to be detached, and uncouple them; that when the cars were being uncoupled it was then and there the duty as well as the custom and practice of the defendant and its servants controlling the movement of the engine and cars to move said train backward very slowly, and at a steady and regular rate of speed, and not to increase the rate of speed at which the cars were being moved, and not to "kick" the cars backward, until the servant of defendant had signaled the defendant's servants in charge of the engine that he had performed the act of uncoupling the cars, and to "kick" the uncoupled cars backward onto the switch; that on or about November 14, 1891, the defendant employed Channing Lowe as a brakeman, and employed other servants to care for, manage and control its trains and engines, and instructed Lowe to work under their direction, and to obey their orders, and so he undertook to do; that at Ashton, while in the employ of the defendant, and acting in the line of duty, as aforesaid, Lowe was directed and ordered to open and place the switch at the north end of the side track on the west side of the main line, and to uncouple from said train, while

in motion, certain cars which the defendant had ordered to be placed upon said side tracks; that Lowe in obedience to said direction and order, opened the switch, and as said train was being slowly and at a regular rate of speed backed over said switch, he, in the exercise of due care and caution, stepped onto the track between the cars for the purpose of uncoupling them; that the servants in charge of said train, without waiting for Lowe to uncouple said cars, or to step off from the track, to give said signal, and without giving him time to do so, and without waiting for signal, and without signal, carelessly, negligently, and without warning, greatly and suddenly increased the speed of the train; that by reason thereof, and while in the performance of his duty, and while in the exercise of due care and caution, and without negligence on his part, he was struck and killed by the defendant's cars.

The defendant admits its corporate capacity, and that it was at the time stated operating its railway as alleged, and denies all other allegations. In a second count the defendant avers, that the killing of Lowe was not the result of any negligence on its part, or of its servants or employees, but was the result of, and occasioned by, the careless and negligent acts of the deceased. That the deceased was at the time of the injury directing the movement of the train, and said train was moved and controlled by his direction only, and in no other or different manner; that the deceased, with knowledge that the train was in motion, and of what was being done, and to be done, with the engine and cars, carelessly and negligently went in between the cars when they were in motion, and voluntarily placed himself in a dangerous place with full knowledge of the danger incurred, whereby he was injured. In a third count it is averred, that Lowe had for a long time prior to his death been in the employ of the defendant's as a brakeman, and had full knowledge of the manner of doing

the work on defendant's road, and of the rules and regulations governing his duties as such brakeman, and of the practice, customs and manner of doing said work, and remained in such employment without protest or demand for any change of manner of doing the same, and thereby voluntarily assumed the risk and danger incident to said employment. In a fourth count it is alleged, that the accident to Lowe was occasioned by his disobedience of the rules and regulations of the defendant company; that said company had on January 1, 1890, made and published rules prohibiting brakemen from going between cars in motion to uncouple them, and that deceased had a copy of said rules, and that by reason of his disobedience thereof he was killed. So much of the rules as are material in this case are as follows:

“The attention of switchmen and brakemen and all other employees of the company, whose duty it is to couple cars, is called to the following rule of the company:

“Rule 15. Great care must be exercised by all persons when coupling cars. \* \* \* All persons entering into or remaining in the service of the company are warned that the business is hazardous, and that they must assume the ordinary risks attending it. Each employee is expected and required to look after, and be responsible for, his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, especially in the switching of cars and in all movements of trains. \* \* \* Getting in between cars in motion to uncouple them, and all similar acts, are dangerous, and in violation of duty, and are strictly prohibited. Employees are warned that if they commit them it will be at their own peril and risk.’”

The plaintiff denied the allegations in the third and fourth counts of the answer, and, further replying, said that, notwithstanding the rules of the defend-

ant company, the defendant and its officers and servants in charge of its trains have required and directed the decedent to perform the services mentioned in the petition, and in the manner therein stated. That at the time the plaintiff's intestate received the injuries complained of it was impossible to operate and run the defendant's trains in conformity to said rules, and perform the train service required of its servants in operating its trains, which was then known to the defendant, and the defendant has thereby waived the observance of said rules on part of the plaintiff's decedent. That the decedent received his orders to set out on the side track the car mentioned in the petition from an officer of the defendant company by means of a telegram received by the conductor in charge of the train, and which was read in the presence and hearing of the deceased.

I. It is said that the court erred in not stating the issues fully and correctly to the jury. It is contended that the court ignored the second and third defenses pleaded in the answer.

1. **APPEAL: error without prejudice: instructions to jury.**

We do not think the claim is well founded. True, the court might have stated the defenses more fully, and it would have been proper to have done so. The court told the jury that the defendant claimed that the negligence of the deceased caused the injury, but did not refer to the facts pleaded upon which said claim of negligence was based. We do not think that the failure of the court to be more specific worked any prejudice to the defendant.

II. Evidence was admitted, over the defendant's objection, to the effect that it was the habit or custom of brakemen on the defendant's road to go onto the track and between the cars, when in motion, for the purpose of coupling and uncoupling them. It is urged that the evidence was immaterial, incom-

2. **PERSONAL injury: contributory negligence: rules of railroad company: waiver.**

petent, and that there was no such issue. The evidence was admissible, as tending to show a waiver of rule 15, which prohibited brakemen from going between the moving cars to couple or uncouple. The contention is that the evidence did not as a matter of law establish a waiver of the rule; that, as the deceased had a copy of the rule, he was in duty bound to do the work in accordance therewith; and the fact that other employees disobeyed it was no excuse for the plaintiff's decedent to do so.

That railroad companies have the right to make and promulgate proper and reasonable rules for the government of their employees in the transaction of the business intrusted to them is well settled, and it is likely there might be cases where they would be derelict in duty if they failed to establish such rules. *Deeds v. Chi., R. I. & P. Railroad Co.*, 74 Iowa, 154; *Cooper v. Central Railroad Co.*, 44 Iowa, 134, 138; *O'Neill v. Keokuk & D. M. Railroad Co.*, 45 Iowa, 546, 547; *Pittsburg, Ft. W. & Chi. Railroad Co. v. Powers*, 74 Ill. 341, 344; *Lockwood v. C. & N. Y. Railroad Co.*, 55 Wis. 50, 12 N. W. Rep. 401; *Reed v. Bur., C. R. & N. Railroad Co.*, 72 Iowa, 166; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. Rep. 380; *Sedgwick v. Illinois Cent. R'y Co.*, 73 Iowa, 158; Beach on Contributory Negligence, section 141. A rule prohibiting the coupling and uncoupling of cars by going in between them while they are in motion is reasonable, and, if enforced, is calculated to protect the limbs and lives of those whose duty it is to perform the always dangerous work of coupling or uncoupling cars. But we can not doubt that such a rule may, by the consent of the parties, be waived or abrogated. Let it be conceded that by receiving a copy of the rules and entering the company's service the deceased became bound by contract, and under obligations to obey the rules given him, nevertheless the parties to the contract

were competent to waive the performance of any part of it. Such a waiver may arise from constant violations of the rule or contract, acquiesced in by the defendant company.

There is a conflict in the cases, some of them holding that a usage or custom can not be shown as against a rule or contract like that under consideration; but we think it is clear that it is competent to show a usage or custom on the part of the employees of defendant at variance with, and in violation of, such a rule, when the defendant has, through its proper officers, knowledge of its violation, and their conduct shows that they acquiesced in such violation. The following authorities support this view: *Northern Pacific Railroad Co. v. Nickels*, 1 C. C. A. 625, 50 Fed. Rep. 718; *Union Pacific Railway Co. v. Springsteen*, 21 Pac. Rep. (Kan.) 774, 776; *Prather v. Richmond & D. R. Railroad Co.*, 9 S. E. Rep. (Ga.) 530; *Hissong v. Richmond & D. R. Railroad Co.*, 8 S. Rep. (Ala.) 776, 777; *Bonner v. Beam*, 15 S. W. Rep. (Tex. Sup.) 798, 799. Nor need it appear that the officers of the defendant, who are charged with the enforcement of its rules, had actual knowledge of the custom of the defendant's employees as to violating the rule. Such notice or knowledge may be inferred from circumstances; it may be implied from the notoriety of the custom, whereby they are chargeable with notice. *Lawson, Usages & Custom*, section 21; *Barry v. Hannibal & St. J. Railroad Co.*, 11 S. W. Rep. (Mo. Sup.) 309.

The evidence satisfies us that it was the custom of the defendant's employees to couple and uncouple cars while in motion; that this practice was open and notorious, and had existed for such a length of time as that the defendant's officers were chargeable with notice of it. It does not appear that those officers of the defendant whose duty it was to make rules, and who may, therefore, be presumed to be especially

responsible for their faithful observance by those under their control, have done anything to cause their enforcement. If rules are made in good faith, and for the protection of the company's employees, that protection can be best obtained by compelling their observance while the party is alive for whose benefit they are made. The defendant can not shield itself from liability by relying upon a rule which, under the evidence, it should know has been constantly violated, and where it may be properly assumed that it acquiesced therein.

III. The defendant asked one Maynard, who was the conductor of the train which killed the decedent, these questions:

“Was it your intention, as conductor and manager of that train, that Mr. Lowe should uncouple those cars, and go up there to set out that car at the time when he did so?” “Now, for the purpose of setting out the car which you had instructions to leave at Ashton, and for clearing the main line for the passing of the passenger train, what movements of your train did you propose to have done to accomplish that purpose at the time?”

3. MASTER and servant: undisclosed intention of employer: evidence.

This evidence was inadmissible. Both questions called for an expression of the undisclosed intention of the conductor with reference to the setting out of the car. There is no pretense that the intention of the conductor in that respect was ever communicated by him to the decedent, or to anyone else, prior to the accident. Lowe could not be charged with the violation of an order conceived in the mind of his superior officer, but never communicated to him. The order to set out the car was in the form of a telegraphic message to the conductor. It was read by him to and in the presence of the brakemen. No express direction was given to Lowe to attend to setting out the car, but he

undertook to do the work. What the conductor intended to do with reference to setting out the car must be determined from what he said and did; further than that it is impossible to go. To admit evidence of unexpressed intentions in such a case would be entering a field not warranted by reason or authority.

IV. Regardless of the rule heretofore spoken of, it is said that the plaintiff should not recover, because the decedent's negligence contributed directly to produce the injury complained of. We have seen that the jury were warranted in finding that the rule prohibiting brakemen from going between the moving cars to couple or uncouple them was waived. It is clear that they so found, as the court instructed them that, if the rule had not been waived, the plaintiff could not recover.

The claim of the appellant is, that the act of the decedent in going in between the moving cars to uncouple them was negligent as a matter of law. Now, going in between moving cars to couple or uncouple them is not necessarily a negligent act. Whether such an act constitutes negligence is to be determined from all the facts and circumstances surrounding its execution. *Henry v. Sioux City & P. Railway Co.*, 75 Iowa, 84, 86; *Beems v. C., R. I. & P. Railroad Co.*, 58 Iowa, 150.

The question of the decedent's negligence was fairly submitted to the jury. They must have found that he was not guilty of any negligence which contributed to produce the accident, otherwise their verdict would have been for the defendant. Now, it appears that no direction was given to Lowe to set out the car at Ashton. The conductor had, before the train reached Ashton, received the message ordering the car set out, and had read it to the brakemen. When he read it he said to them, "We will set out that head stock car."

4. RAILROADS:  
injury to  
brakeman:  
contributory  
negligence:  
evidence.

No other or further order was given as to setting out the car. When the train arrived at Ashton the conductor and two of the brakemen proceeded to unload freight, and Lowe informed the engineer of the order to set out the car. He then cut off the stock car and signaled the engineer to go ahead. Fourteen or fifteen cars were left standing on the main track and six cars were cut off with the engine. Lowe went over to the switch, and gave the engineer a signal to stop. The train stopped. Lowe threw the switch and gave the signal to back up. He then went in between the cars to uncouple the stock car. The cars were at first backed up slowly, and then, without any further signal from Lowe, the engineer gave the cars a "kick," and soon thereafter Lowe's body was discovered under the moving cars.

From the evidence it does not appear that it was the special duty of any particular member of the train crew to place cars upon the side track. Sometimes that work was performed by the conductor and a brakeman, sometimes by two brakemen. Lowe, in connection with the engineer, undertook to carry out the order in accordance with the telegram read to the brakemen by the conductor. It is certain that in so doing he was not a mere volunteer, but a servant of the defendant, performing an act within the line of his employment and duty. He might have uncoupled the cars before he threw the switch, or after they had passed upon the side track, and in either case the cars would not have been moving; but the evidence shows that that was not the usual way of doing. He proceeded in the manner usual and customary with the defendant's employees. It appears also that to have uncoupled before throwing the switch, or after the cars had passed upon the side track, would have required more time than to uncouple while the cars were in motion. The evidence shows that when Lowe passed in between the cars to uncouple

they were moving about as fast as a man would walk, and that the kick was given, and speed rapidly increased, without any orders from Lowe. It also appears that there was a rule of the defendant company, known to all its employees, forbidding any freight train from occupying the main track within ten minutes of the time when a passenger train was due. There was only nine minutes after the freight train arrived at Ashton in which to unload its freight, set out the stock car on the side track, return with the engine and cars to the main track, and place the freight on the side track. The freight train was late. It was of the utmost importance that it be moved from the main track to make way for the passenger train, which was due in nineteen minutes after the arrival of the freight at Ashton. It must be presumed that Lowe acted with knowledge of the rule, and realized the necessity of prompt action, in order that the work might all be accomplished within the nine minutes.

In view of these and other facts which might be stated, it was for the jury to say whether Lowe was negligent in attempting to uncouple the cars by going in between them while they were moving. They have said that he was not guilty of negligence in so doing, and we think they were warranted in so finding, under all the facts and circumstances in evidence. The question of Lowe's negligence was one of fact to be determined by the jury. *Whitsett v. C., R. I. & P. R'y Co.*, 67 Iowa, 150, 158; *Tabler v. Hannibal & St. J. R'y Co.*, 93 Mo. 79, 5 S. W. Rep. 810; *Baldwin v. St. L., K. & N. W. R'y Co.*, 72 Iowa, 45.

V. Was the defendant negligent in suddenly increasing the speed of the train after Lowe had gone in between the cars for the purpose of uncoupling them? This question was fairly submitted to the jury, and they found against the defendant. If the declarations of the engineer were

s. —: negli-  
gence: evi-  
dence.

properly received in evidence, and that they were is not questioned in the appellant's argument, the jury were justified in their finding. One Ragan testified to statements made by the engineer, as follows:

"Well, as we were walking along, as I said, he overtook me going up, and I didn't know at that time that he was the engineer, until we spoke to each other, and I asked him if the man was killed, and he says 'he was.' And I says, 'How did it happen?' He says to me: 'I was looking out of the cab window, the east cab window, and the fireman was looking on the west side, and he said the man was on the west side.' He says to the fireman, 'What is he saying?' and he answered him, he said, 'He is not saying anything.' At the same time he held up his hand and made a motion that way, holding the hand up and shaking it sidewise. I didn't know what it meant. 'I don't know what he says,' he said. 'I think he wants a little kick; give him a little kick?' and he says, 'I gave it to him.' Those words he used exactly. Question. Who made the gesture that you refer to? Answer. The engineer, as I supposed he was the engineer. I took it by that, from what he said."

These statements were made by the engineer to the witness immediately after the accident happened, and prior to the taking of Lowe's body out from under the train. From the evidence it is clear that the jury were warranted in finding the defendant's negligence was established. The train was under Lowe's orders when the car was being set out. The fireman knew that Lowe was in between the cars. He knew he had given no order to increase the speed of the train, and recklessly, and without any warning, and without regard to Lowe's safety, the cars were kicked and the speed increased. It was an act of gross negligence, uncalled for, and without justification. Whether this act was the cause of Lowe's death is a question, we

think, not free from doubt; but the verdict is not so wanting in support by the testimony as to warrant us in disturbing it.

VI. It is urged that the damages are excessive, and not warranted by the evidence. The verdict was for five thousand dollars. The court instructed the jury as follows:

"Paragraph 7. If you find for the plaintiff, then you will determine from all of the evidence before you

what amount you will allow her as damages resulting to the estate of the deceased by reason of his death; and in determining what amount you will so allow, you should

take into consideration the age of the deceased, his occupation, the wages he was receiving, the condition of his health, his ability, if any, to earn money, and all these, in connection with all of the evidence before you, and determine therefrom the probable pecuniary loss to the estate of the deceased, caused by his death, and allow the plaintiff such sum, and such only, as will compensate the estate for such loss."

The instruction is not objectionable, nor was it error to refuse the one asked by the defendant. The instruction asked lays down the doctrine that, to determine the loss the decedent's estate has sustained, the jury must ascertain from the evidence the amount he "would accumulate and have over and above his liabilities at his death, if he had lived the allotted time, as shown by the evidence to be his expectancy of life, and then allow such a sum as, placed at legal interest for that time, would produce a like sum."

VII. The evidence showed that the deceased was in good health, twenty-five years old, and was at the time of his death earning fifty-five dollars per month; that he left a wife and three children; that he had been braking for five years;

6. —: —: injury causing death: measure of damages.

7. —: —: —: damages: verdict.

that his family depended entirely upon him for support; that he left no estate; that it took all his wages to support his family. It is impossible to measure with any degree of exactness just what the actual pecuniary loss in such a case is. We are not disposed to measure the damages in such cases by an ironclad rule, nor are we inclined to take a step in advance of what we have heretofore held. We think the rule as repeatedly approved by this court is fair and just. We need not review our decisions touching this question. That was done to some extent in the recent case of *Wheelan v. Chi., M. & St. P. R'y Co.*, 85 Iowa, 167, wherein the appellant urged that an instruction was erroneous for substantially the same reasons now pressed. The instruction given is, in substance, the same as many that have heretofore met the approval of this court, and we are not justified in holding that the court below erred in refusing to give one more definite so long as the one given is correct. The damages were not excessive.

The judgment below is AFFIRMED.

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GILMAN LINSEED OIL COMPANY, Appellee, v. NORTON  
& WORTHINGTON *et al.*, Appellants.

1. **Sales:** BY AGENT OF PROPERTY BELONGING TO PRINCIPAL: TITLE OF VENDEE. The plaintiffs advanced money to L. & Co., with which to purchase flax seed for the purpose of loaning it to farmers, with a view to procuring the product of the seeding, under an agreement that all seed purchased should become the sole and absolute property of the plaintiff, and that L. & Co. should have no interest therein nor lien thereon, save for money actually advanced, and that so long as it remained in the hands of L. & Co. they should hold it only as agents of the plaintiff. L. & Co. having purchased seed with money thus advanced by the plaintiff, and sold the same to the defendants, *held*, that, although L. & Co. were, under said agreement, obliged to guarantee the weight of the seed at the point where it was to be received by the plaintiff, and were responsible for damages resulting from shipments of unmerchantable seed, the money advanced was not in the nature of an extension of credit, nor was the transaction a

conditional sale, but that the seed purchased belonged to the plaintiff, and that L. & Co., by selling it as their own, could not give the defendants title thereto, although at the time of said sale the bins of L. & Co. were filled, and they were obliged to ship the seed in question away for want of room.

2. ———: ———: ESTOPPEL. Although the possession and control of personal property be given to an agent, who is engaged in the business of buying and selling property of like character, yet the agent in fact have no authority to sell, the principal will not be estopped from claiming his property as against an innocent purchaser without notice, to whom the property was sold without authority, and without the knowledge of the principal.
3. ———: ———: ———. The fact that the plaintiffs, after receiving information of the sale to the defendants, attempted to procure a settlement with L. & Co. for the value of the seed sold, and made no demand of the defendants therefor until after the commencement of this action, *held*, not to estop them from asserting their claim against the defendants for the value of the property.

*Appeal from Lyon District Court.*—HON. SCOTT M. LADD, Judge.

TUESDAY, OCTOBER 17, 1893.

ACTION at law to recover the value of a quantity of flax seed alleged to have been wrongfully converted by the defendants to their own use. There was a trial by the court without a jury, and a judgment for the plaintiff. The defendants appeal.—*Affirmed*.

*H. G. McMillan, J. M. Flower and T. M. Stuart,*  
for appellants.

This agreement is one wherein the transfer of title or ownership of personal property is made to depend upon a condition. This being so, the Gilman Company can claim no rights against defendants herein, where it is conceded that they received this flax seed without any notice, actual or constructive, of the rights of the plaintiff. Section 3093, McClain's Code; *Moline Plow Company v. Braden*, 71 Iowa, 141; *Singer Sewing Machine Company v. Halcomb*, 40 Iowa, 33;

*Taylor v. B., C. R. & N. R'y Co.*, 4 Dillon, 570. The plaintiff is conclusively estopped from claiming any rights in the flax seed as against defendants. Bigelow on Estoppel [5 Ed.], 560. Where there is evidence of acts of ownership, an instruction that possession of property is *prima facie* evidence of title, and, coupled with acts of ownership, is conclusive as to creditors, without notice, extending credit on such ownership, is proper. *Towne v. Sparks*, 36 N. W. Rep. (Neb.) 375. The rights of third parties do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance. *Cowdrey v. Vandenburg*, 101 U. S. 572; *Sessions v. Rice*, 70 Iowa, 306; *Walker et al. v. Grand Rapids Flouring Mill Co.*, 35 N. W. Rep. 332; *Preston v. Wetherspoon*, 109 Ind. 457; 58 Am. Rep. 417; *Saltus v. Everet*, 20 Wend. 267; 32 Am. Dec. 541; *Rosser v. Darden*, 14 Am. St. Rep. 152; *Williams v. Merle*, 25 Am. Dec. 15; *Thompson v. Blanchard*, 4 N. Y. 303; *De Meyer v. Souser*, 6 Wend. 436; *Barnard v. Campbell*, 55 N. Y. 456; *Fluman v. McKean*, 25 Barb. 474; *Ludden v. Hayzen*, 31 Barb. 650; *Gass v. Hampton*, 16 Nev. 185; *Wright v. The Dickey Co.*, 83 Iowa, 464. The plaintiff is now surely estopped on account of its conduct subsequent to the sale of the flax seed to the defendants. It was their duty to notify defendants at once when they discovered that this grain had been sold by Lamar & Co., but the testimony shows that it never notified Norton & Worthington at all, and that as a matter of fact defendants did not know that plaintiff was the owner of this flax seed, or claimed any right or interest therein, until this suit was brought, which was more than a year after the transaction in

question. "He who remains in silence when in conscience he ought to speak, will be debarred from speaking when in conscience he ought to remain silent." *Minnesota Linseed Oil Co. v. Montague*, 21 N. W. Rep. 135; *Griffith v. Wright*, 6 Col. 248; *Greene v. Smith*, 57 Vt. 268; *Pence v. Arbuckle*, 22 Minn. 417; *Hardy v. Chesapeake Bank*, 51 Md. 562; *Horn v. Cole*, 51 N. H. 227; *Kingman v. Graham*, 51 Wis. 232; *Brant v. Virginia Coal Co.*, 93 U. S. 326. It has been held that "silence in not repudiating the unauthorized act of an agent, when such act is brought home to the knowledge of the principal, amounts to a ratification on the part of the principal." *Torry v. North Chicago City R'y Co.*, 32 Fed. Rep. 270; *Alexander v. Jones*, 64 Iowa, 207; *Hayes v. Steele*, 32 Iowa, 44; *Farrell v. Howard*, 26 Iowa, 381; *Burlington Co. v. Greene*, 22 Iowa, 508; *McClure v. Everton*, 14 Lea (Tenn.), 495; *Beall v. January*, 60 Mo. 434; *Shinn v. Hicks*, 4 S. W. Rep. 486; 1 Am. and Eng. Encyclopedia of Law, 439. Ratification of an unauthorized act of an agent may be presumed from the acquiescence of the principal after notice. *Quinn v. Dresback*, 79 Cal. 159; 7 Am. St. Rep. 138; *Central Railway Co. v. Cheatham*, 85 Ala. 292; 7 Am. St. Rep. 48; *Hurley v. Watson*, 68 Mich. 532; *Reese v. Medlock*, 27 Tex. 120; 84 Am. Dec. 634; *Tier v. Thompson*, 35 Vt. 179; 82 Am. Dec. 634; *Ward v. Williams*, 26 Ill. 447; 79 Am. Dec. 385. It has been held that "acts of a principal will be liberally construed in favor of a ratification." *Szymanski v. Plassen*, 20 La. 90; 96 Am. Dec. 382. If the plaintiff did not approve of the sale made by Lamar & Co. to Norton & Worthington of the flax seed in question, it was their duty to repudiate such a sale within a reasonable time after the notice of its existence. *Hoosac Mining & Milling Co. v. Donat*, 10 Col. 529. The rule has been laid down that "in some instances very slight evidence of ratification is sufficient to bind the princi-

pal." *Loraine v. Coutright*, 3 Wash. 151; *Richmond Mfg. Co. v. Starks*, 11 Mason, 296; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Rogers v. Kneeland*, 13 Wend. 114; *Blakely v. Graham*, 111 Mass. 8; *Mechem on Agency*, p. 152; *United States in Townsend v. Chappelle*, 79 U. S. 681; 2 *Wade on Notice* [2 Ed.], p. 376.

*J. H. Parson and E. Y. Greenleaf*, for appellee.

Under the contract the flax seed belonged to plaintiff. *VanSandt v. Dows*, 63 Iowa, 594. The defendants converted the flax seed and are liable. *Brown v. Campbell*, 24 Pac. Rep. 492. The ownership did not depend upon any condition. The contract made the title at all times vest in the plaintiff, and at no time was it vested in Lamar & Co. The title depended upon no condition. It was purchased with the plaintiff's money, and was at all times the plaintiff's property. Lamar & Co. were special agents to buy flax seed for the plaintiffs, but had no authority whatever to sell, and hence defendants are not protected because Lamar & Co. exceeded their authority. The policy of our law is to compel the purchaser to look to the title of what property he purchases, and, if he does not do so, he is not protected, if it is found that the one from whom he purchased has not authority to sell, and is not vested with title. The general rule is that the owner of property can follow his property into any place and recover it or its value. Where the mere possession of goods is *prima facie* right to transfer, is limited to cases where the goods placed by the owner in the hands of one whose business it is to sell goods of the same kind as agent. But, if the agent carries on another independent business, by which he may have possession of the goods, then his possession of the same does not *prima facie* give the right to transfer. *Mechem on Agency*, sections 786, 788; *Levy v. Booth*, 58 Md. 305;

42 Am. Rep. 332. "The doctrine of estoppel can not apply where the acts or omissions relied on as creating the estoppel have never been acted on by the party claiming the estoppel." *Maurice v. Sargent*, 18 Iowa, 90; *Tufts v. McClure*, 40 Iowa, 317. Acts subsequent to the transaction do not work an estoppel. *Gee v. Moss*, 68 Iowa, 318; *Oswold v. Hayes*, 42 Iowa, 104. Again, when one takes the property of another wrongfully, and sells it, not as an agent, but on his own account, mere silence on the part of the owner does not confirm the sale. The confirmation must rest upon some consideration. *Hamlin v. Sears*, 82 N. Y. 329; 31 Am. Rep. 546; 1 Am. and Eng. Encyclopedia of Law, page 431, note 1. When an agent has wrongfully sold his principal's property, on his own account, mere silence on the part of the owner does not confirm the sale, and, upon discovering the wrong, he is not required to make immediate effort to recover the property, and silence, short of the time prescribed by the statutes of limitation, will not bar his claim. *Hamlin v. Sears*, 82 N. Y. 329. Where the party making the contract had not the authority to contract for the third party, and did not profess at the time to act for him, the subsequent assent of said third party, to be bound as principal, has no operation. The ratification is without effect when the act is done by a person not professedly acting as agent of the party claimed as principal. *Workman v. Wright*, 33 Ohio St. 405; 31 Am. Rep. 546; Mechem on Agency, sec. 127.

ROBINSON, C. J.—In the year 1889 the plaintiff was engaged in business in Gilman, in the state of Illinois, and E. M. Lamar & Co. were doing business at George, in this state. In March of that year the plaintiff entered into an agreement in writing with Lamar & Co., by which the former agreed to furnish to the latter one thousand bushels of flax seed for the purpose of having it loaned to farmers for use as seed,

for the purpose of procuring the product of the seeding. Lamar & Co. were to loan the seed to farmers for the purpose stated only, for and in the name of the plaintiff, on terms specified in the agreement, taking notes to secure payments for the seed, and making contracts for the product thereof at the rate of twenty-five cents less than the Chicago prices for each bushel delivered to the agent of the plaintiff at George. Lamar & Co. were to keep an account of their transactions, on books of account which were to be furnished by and remain the property of the plaintiff, and to make reports to it when demanded. They were to ship to the plaintiff all the products of the loaned seed which they should receive, under the contracts with the farmers, and were not to loan, sell, or buy any flax seed during the continuance of the agreement for any one excepting the plaintiff, without its written consent. They were to receive as their only compensation for services rendered in performing the agreement on their part, the sum of five cents per bushel for the flax seed bought for and shipped to the plaintiff. The agreement also contained a paragraph in words as follows: "It is further mutually agreed that all seed purchased under the agreement is from the time of such purchase the sole and absolute property of the party of the first part (the plaintiff), and that the party of the second part (E. M. Lamar & Co.), has no right or interest in, or lien on, the same, save only for money they have actually advanced, and that so long as it remains in their actual possession they hold it only as the agent of the party of the first part." There was also a provision for the payment of a commission for purchasing seed not under contract, but it is not involved in this case.

In the latter part of the year 1889 Lamar & Co. purchased flax seed under that agreement with money furnished by the plaintiff. In November, 1889, they shipped to the defendants in Chicago two car loads of

flax seed, and drew on them for nearly the amount of its value. The flax seed was received by the defendants and sold, and the drafts were paid. The seed so received and sold was purchased by Lamar & Co. under their agreement with the plaintiff, with its money, and they had no lien upon it for any purpose. The defendants claim that they received and sold the seed only as brokers and commission merchants, acting for the shippers, and receiving a commission for their services, and that they did not purchase it on their own account. It appears that in December, 1888, they arranged with Lamar & Co. to furnish them two thousand dollars, for use in their grain and seed business, and the next year the amount was increased to three thousand dollars. Shipments were made by Lamar & Co. to the defendants to the amount of thirteen thousand dollars, and drafts to the amount of sixteen thousand dollars were drawn on them and paid, leaving a balance due from Lamar & Co. to the defendants of three thousand dollars. When the shipments in question were made, the drafts drawn against them were charged to Lamar & Co., and the proceeds of the shipments were credited to them.

I. The defendants contend that the agreement between the plaintiff and Lamar & Co. was in the nature of an extension of credit, and that the latter were charged with the cash advanced them, and received credit only when the flax seed was delivered in Gilman; that they were required to guaranty weights and quality, and that the plaintiff reserved the right to refuse any flax seed if the weights and quality were not satisfactory. The claims thus made are not supported by the evidence. It is true that Lamar & Co. guarantied the weights at Gilman, and that they were responsible for damages which should result from shipping inferior, dirty, or unmerchantable seed, but the

1. **SALUS:** by  
agent of prop-  
erty belonging  
to principal:  
title of vendee.

right to reject seed was not reserved to the plaintiff. On the contrary, the title to all seed purchased under the agreement vested in it at once, and the obligations in regard to weight and quality of seed placed upon Lamar & Co. were designed to secure a faithful performance of the agreement on their part, or to require them to make good the loss which should result from their failure to do so. The transfer of title did not depend upon any condition, and the transaction was not, in any sense, a conditional sale of property; and section 1922 of the Code, which requires sales, contracts, and leases wherein the transfer of title or ownership of personal property is made to depend upon any condition to be in writing and recorded, to be valid against certain creditors and purchasers without notice, has no application. See *Van Sandt v. Dows*, 63 Iowa, 594. The flax seed, when shipped to the defendants, belonged to the plaintiff, and Lamar & Co. had no authority to divest it of its title by selling the seed to others. It is said that for a time the plaintiff was unable to receive flax seed; that Lamar & Co. had filled their bins and were compelled to ship some of their contents away. But, if that be true, it gave them no right to ship in their own name, and sell it as their own.

II. It is contended that the plaintiff is estopped to deny the right of Lamar & Co. to sell the seed, for

2. —: —: the reason that it had given them the pos-  
estoppel. session and control of it, and the appar-  
ent right to treat and dispose of it as their own. The plaintiff did not authorize Lamar & Co. to ship the flax seed to anyone but itself, and it did not know anything of the shipments until after they were made. If it is estopped to claim the seed, it is because Lamar & Co. were buying wheat and other grain, and selling it on their own account. But, in our opinion, that fact alone was insufficient to bind the plaintiff by selling the seed in question. "The mere possession of

chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give good title." *McNeil v. Tenth Nat. Bank*, 46 N. Y. 329; *Ballard v. Burgett*, 40 N. Y. 314; *McGoldrick v. Willits*, 52 N. Y. 617; *Barnard v. Campbell*, 55 N. Y. 462; *Sanders v. Keber*, 28 Ohio St. 640; *Osborn v. McClelland*, 43 Ohio St. 307, 1 N. E. Rep. 644; *Reed v. Upton*, 10 Pick. 522; *Coggill v. Hartford & N. H. Railroad Co.*, 3 Gray, 545; *Dunlap v. Gleason*, 16 Mich. 158; *Kohler v. Hayes*, 41 Cal. 455; *Mechem on Agency*, sec. 788; 1 *Benjamin on Sales*, sec. 437.

Some of the authorities cited refer especially to conditional sales, but are applicable to the question under consideration. The doctrine which they announce is applicable to cases where personal property has been delivered to a person who is engaged in the business of buying and selling such property. In *Levi v. Booth*, 58 Md. 305, it is said that, aside from statutory provisions regulating such matters, "it is very clear \* \* \* that the bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner. If he sells as owner, there must be some other indicia of property than mere possession. There must \* \* \* be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership or authority to sell, and in which the real owner will not be heard to deny or question to the prejudice of an innocent third party dealing on the faith of such appearances." Following that rule, it was held, in effect, that a dealer in jewelry, who received a valuable diamond ring to obtain a match for it, or, failing in that, to get an offer for it, could not by a sale thereof to an innocent purchaser

divest the owner of his title. In *Conable v. Lynch*, 45 Iowa, 84, it was held that an agent who received a wagon and other property under a contract to retail them for his principal could not sell the wagon as his own to an innocent purchaser, and receive credit for its value on a debt owing to him by the agent. See, also, *Baehr v. Clark*, 83 Iowa, 313; *Crooker v. Brown*, 40 Iowa, 144.

The case of *Wright v. E. M. Dickey Co.*, 83 Iowa, 464, relied upon by the defendants as being decisive of the question under consideration, is not in conflict with the conclusion we reach. It appeared in that case that a landlord having a lien upon certain grain knew that his tenant was selling it, but was silent, when, by making known his lien, he would have prevented the sale to an innocent purchaser. In this case, however, the plaintiff not only had no knowledge of the intention of its agents to sell, but had no reason to believe that they intended to do so.

III. It is insisted that the plaintiff is estopped, by its conduct subsequent to the sale, to assert ownership of the flax seed, and that it has in effect  
s. —: —: —. ratified the sale. It appears, that some attempt was made by the plaintiff to obtain a settlement with Lamar & Co., and that it made no demand upon the defendants for the seed until this action was commenced. There was no ratification of the sale, and the defendants have not been prejudiced in any manner by the delay of the plaintiff in demanding the compensation it seeks to recover in this action. It was justified in endeavoring to obtain redress from Lamar & Co. Having failed in that, under the circumstances we have stated, it is not estopped to assert its claim against the defendants. We have stated the facts as the district court was authorized to find them. With respect to some there was a conflict in the evidence, but the conclusion of the court is so far supported by the evidence

that it must be treated as conclusive. It rendered judgment in favor of the plaintiff for the value of the flax seed in dispute, with interest and costs. We find no cause to disturb that judgment, and it is, therefore, **AFFIRMED.**

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**E. T. OLDER Appellant, v. JAMES QUINN, Appellee.**

1. **Arbitration: VALIDITY OF AWARD: ELECTION OF REMEDIES.** Where the report of arbitrators fails to show affirmatively that the arbitrators were sworn, it will be presumed, in the absence of a showing to the contrary, that the arbitrators complied with the law in this respect, or that the parties waived their making an affidavit, and if the submission and award otherwise conform to the law relating to arbitration, the party in whose favor the award is, can not, after it is rendered and placed in the hands of the clerk of the court, at his election, sue thereon, or pursue the statutory provisions for judgment, but must be content with the further statutory remedies.
2. ———: ———: ———: **CONSTRUCTION OF STATUTE.** Section 3431 of the Code providing that the statutes relating to arbitration shall not affect "the control of the court over the parties, the arbitrators or their award, nor impair or affect any action upon an award," relates to the jurisdiction of the court over common law awards, and does not entitle a party who has secured an award upon a statutory arbitration, to abandon the statutory remedies for judgment thereon, and sue upon it as a common law award.

*Appeal from Fayette District Court.*—HON. W. A. HOYT, Judge.

TUESDAY, OCTOBER 17, 1893.

**ACTION on an award.** A demurrer to the petition was sustained, and judgment rendered against the plaintiff for costs, from which he appeals.—*Affirmed.*

*H. P. Hancock and Rogers & Quigley*, for appellant.

*Ainsworth & Hobson*, for appellee.

**KINNE, J.**—This is an action on an award of arbitrators. The petition alleges that certain disputes and

controversies existing between the parties were submitted to arbitration. The submission is set out. It is entitled "In the District Court of Fayette County, Iowa." It clearly states the matters submitted, names the arbitrators, and also provides: "The said arbitrators to return their award to the said district court for judgment." This submission was properly acknowledged. It is urged that in pursuance of the agreement the arbitrators met, heard the evidence and arguments, and on December 15, 1890, made and published their award, finding that the defendant was indebted to the plaintiffs in the sum of one hundred and eighty-five dollars and thirty-one cents; that they determined that the costs amounting to twenty-two dollars and fifty cents, should be paid equally by the parties; that the award was filed in the office of the clerk of the district court on May 14, 1891; that the plaintiff is the owner of the award, and that the defendant refuses to pay the sum so found by the arbitrators. Judgment is demanded. The award is set out, and shows the meeting of the arbitrators; that a hearing of the matter was had, and a number of witnesses examined. It contains the finding of the arbitrators heretofore referred to, and is signed by them.

The defendant demurred to the petition, because: *First*, it does not state facts constituting a cause of action, in this: it does not state an arbitration and award of the parties, except a statutory submission; *second*, it does not state any submission binding either party to abide by an award made; and, *third*, the petition shows upon its face that the submission, arbitration, and award sued on were intended to be statutory, and the same constitutes no cause of action in favor of the plaintiff against the defendant. The court sustained the demurrer, and rendered judgment against the plaintiff for costs, from which he appeals.

I. Our statute provides for the submission to arbitration of all controversies which might be the subject of a civil action. Code, section 3416. 1. ARBITRATION: validity of award: election of remedies. The submission must be signed and acknowledged, and must specify what demands are to be submitted, the names of the arbitrators, and the court by which the judgment on their award is to be rendered. Code, section 3417. It is provided that all the rules by law prescribed for referees shall be applicable to arbitrators, except as in the chapter otherwise provided, or except as otherwise agreed upon by the parties.

Among other provisions touching referees, which are applicable to arbitrators, is one requiring the referee to make affidavit well and faithfully to examine the case, and make a just and true report, which affidavit must be returned with his report. From the argument alone, it appears that the plaintiff made no effort to secure a judgment under the statute on the award because the arbitrators were not sworn. The pleadings are silent as to that fact. Inasmuch as the pleadings do not affirmatively show that the arbitrators were not sworn, we think we must hold that the presumption is that they complied with the law in that respect, or that the parties waived their making an affidavit, as they had a right to do under the statute. Code, section 3420. This court has held that the presumption is that the arbitrators performed their duty as to swearing witnesses, in the absence of a showing to the contrary, and that an award need not show on its face that the arbitrators were sworn. The law seems to be that such fact need not be made to affirmatively appear. *Tomlinson v. Hammond*, 8 Iowa, 40, 43. The statute in force when the above case was decided was, in substance, the same as our present law, except that there was no provision for the return of the affidavit taken by the referees. Under our statute it is compe-

tent for parties to agree to a hearing without the arbitrators being sworn. Code, section 3420. If the parties to the submission proceed with the hearing without interposing the objection that the arbitrators were not sworn, it should be considered that they have agreed or consented thereto, and they should be held concluded by their acts in that respect. *Sloan v. Smith*, 3 Cal. 406; *Winship v. Jewett*, 1 Barb. Ch. 173. In the light of this presumption, the submission and award on their face are regular, and within the provisions of the statute. It is clear that the parties intended to enter into a statutory submission. They sufficiently provided for the entry of a judgment on the award in the district court of Fayette county, Iowa. Having made the submission under, and, so far as appears on its face, in conformity to, the statute, and the entire proceedings having conformed to the law, they were bound to pursue the remedy therein provided in such cases. In other words, we hold that it appears by the petition that the submission and award are within the provisions of the statute relating to arbitration, and that, when such is the case, the law does not contemplate that the party in whose favor the award is, may, after it is rendered and placed in the hands of the clerk, at his election, sue thereon, or pursue the statutory provisions for judgment thereon. Having availed himself of the provisions of the statute, and conformed thereto, he must be held to his election, and be content with the further statutory remedies.

In the view we have taken, we need not determine the questions as to the right of a party who resorts to a statutory arbitration resulting in an award, which can not be enforced by a judgment, as provided by the statute, because of some neglect or omission to comply with all its provisions, to resort to an action at law on the award, thus treating it as a common law arbitration and award. That question, as we have seen, in view

of the presumptions of the law that the arbitrators have done their duty, is not involved in this action.

II. It is contended that, under our statute, though parties have pursued its provisions in reference to arbitration proceedings, still they may, at <sup>construction of statute.</sup> their election, and after an award is made, seek judgment on it as provided by statute, or they may treat it as a common law award, and sue directly thereon.

The statute reads: "Nothing herein contained shall be construed to affect in any manner the control of the court over the parties, the arbitrators, or their award; nor to impair or affect any action upon an award, or upon any bond or other engagement to abide an award. Code, section 3431. This section has never been construed by the court. We think it clearly relates to the jurisdiction of the court over common law awards. Were it not for this section, it might be contended that the statutory means of arbitration were exclusive, and took away the common law right. To prevent any such claim, this statute was enacted. It certainly was not intended that parties should have the right, after entering upon a statutory arbitration, and securing an award thereunder, to then abandon it, and sue upon it as a common law award. True, it has been held that this may be done (*Burnside v. Whitney*, 21 N. Y. 148); but this decision was based upon two sections of the Revised Statutes of New York, one of which is similar to ours, and the other is much broader. Proceedings for an arbitration under our statute may be said to be virtually in court. The statute expressly provides that the award must, in the absence of a time fixed in the submission, be filed within one year from the time the submission is made. Code, section 3424. The manner of the transmission of the award to the court is fixed. Code, section 3425. It is to be docketed at the term of court to which it is returned, and to

be called up and acted upon in its order. Code, section 3426. It may be rejected or adopted by the court or recommitted. Code, section 3427. When adopted and entered of record, the award has the force and effect of a verdict. Code, section 3428. Clearly, when the award has been returned to court, it is a proceeding in court, in so far at least that no independent action thereon can be prosecuted. After its return, and prior to its adoption by the court, it is in the nature of a verdict by a jury, agreed upon, but not yet reported. The object of the statute was to avoid litigation. This object would not be attained by permitting parties agreeing to a statutory arbitration to prosecute another suit on the award.

The demurrer was properly sustained. **AFFIRMED.**

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**JOHN DOOLEY, Appellee, v. BURLINGTON, CEDAR RAPIDS  
& NORTHERN RAILWAY COMPANY, Appellant.**

1. **Railroads: EJECTION OF PASSENGER: ACTION FOR DAMAGES: PLEADING.** Where, in an action to recover damages on account of an ejection from a railroad train for refusing to pay the fare demanded, the plaintiff relied, in his petition, upon a contract with the railroad company as presented in a ticket purchased by him, *held*, that the plaintiff's right to recover must depend upon the contract contained in the ticket.
2. ———: ———: ———: **MUTILATION OF CONTRACT: EVIDENCE.** At the time of the plaintiff's ejection from the train in 1891 he held a ticket purchased in 1890, which he claimed was, according to its terms, good for passage until 1899, but at the time of its production in evidence on the trial it was impossible to determine, from inspection, the date to which it run, because of its mutilated condition. *Held*, that the ticket agent, of whom the ticket in question was purchased, should have been permitted to testify as to the limit of time to which he was permitted to sell tickets at the time of the purchase.

*Appeal from Palo Alto District Court.*—HON. LOT  
THOMAS, Judge.

**TUESDAY, OCTOBER 17, 1893.**

EMMETSBURG and West Bend are stations on the defendant's road. The regular fare between the stations is fifty-five cents. On the twenty-seventh day of October, 1890, the plaintiff purchased of the defendant's agent at Emmetsburg a round-trip ticket to West Bend and return, for which he paid one dollar. The ticket was composed of two parts; one to be used in going, and the other in returning. The trip to West Bend was made, and the part of the ticket for that purpose was, by the conductor, detached, and the return part was retained by the plaintiff, and, with certain exceptions, to be stated, it was as follows:

"Burlington, Cedar Rapids and North'n R'y.

Return Excursion Ticket.

Good for one passage.

From

WEST BEND.

To

Emmetsburg.

If presented on or before Nov. 27, 189

Conductors will take up this ticket and collect full fare if presented after the date named above. Passengers will not be allowed to stop over on this ticket.

J. E. HANNEGAN,

2833

Gen. Tick. & Pass. Agt."

The original ticket was printed, except the words "West Bend" and "Nov. 27," which words were written in, and also a change made in the figures "189," which change is a subject of dispute in the case, the contention being whether it was so changed as to read "1890" or "1899." On the thirty-first day of March, 1891, the plaintiff came on board the defendant's train at West Bend, and offered the retained part of the ticket for his passage to Emmetsburg, which the conductor refused to accept, and demanded fare, which being refused the plaintiff was at the next station, Rodman, ejected from the train, and compelled to walk about ten miles to Emmetsburg, and this action is for damages because of such eject-

ment. The jury returned a verdict for three hundred dollars, and, from a judgment thereon, the defendant appeals.—*Reversed*.

*S. K. Tracy and Soper, Allen & Morling*, for appellant.

*C. E. Cahoon and Thomas O'Conner*, for appellee.

GRANGER, J.—I. A question of fact submitted to the jury was as to the year to which the ticket was limited; that is, was it 1890 or 1899? The instructions of the court make the plaintiff's right to recover depend upon the limit actually in the ticket when it was issued.

The jury was told that if the limit of the ticket, as expressed on its face, was November 27, 1890, it did not entitle the plaintiff to a passage when offered; but, if the limitation so expressed on the ticket was November 27, 1899, the plaintiff was entitled to a passage on the ticket. From this, we understand that the court treated the contract as that expressed on the face of the ticket. In view of the pleadings, we think this was proper. This much is said because of a claim in argument that the ticket did not contain the contract, but was in the nature of a receipt or voucher. The situation of the case does not call for the determination of such a question. Unmistakably the petition seeks a recovery only on the terms of the contract as indicated by the ticket by stating that it was "good for return until the twenty-seventh of November, 1899." The allegation is met by a statement in the answer that "said ticket was only good to November, 27, 1890." We treat such pleadings as putting in issue the fact of what the ticket contained. If, as to matters of such dates, the ticket did not express the intention of the parties, or for any reason was not to control, it should be inquired into only when properly put in issue.

1. RAILROADS:  
ejection of  
passenger:  
action for  
damages:  
pleading.

II. The inquiry, then, was limited to the actual terms of the ticket when issued. The court said to the jury 2. —: —: —: that the ticket was somewhat mutilated, mutilation of contract: evidence. and that it was uncertain as to the time it should remain in force. But for this uncertainty there would have been no necessity for testimony to fix the date, for the ticket would have settled the dispute as to time. The plaintiff testified that the ticket, when he obtained it, had the figures "189" in print, and the figure "9" added in ink, making "1899." The conductor testified that when presented to him the ticket read "1890." The ticket is properly certified and before us, and it is impossible to determine from inspection at this time what the date is, because of its mutilated condition. The fact as to the actual date is one of much doubt. The court told the jury to determine the fact "not alone from the ticket," but from all the evidence in the case.

One Stickney was the agent for the company that sold the ticket, and, as a witness, testified that the ticket was in his handwriting, but that he did not remember the particular sale, and could not testify as to the actual date inserted. He was then asked to state the limit he was, at that time, "permitted to sell the tickets on, on what limitation?" The question was excluded as incompetent and immaterial. The ruling is erroneous. In an issue of that kind we think the jury could properly consider the authority the agent possessed in determining the date he probably put to the ticket. If, by his instructions, he was limited to thirty days, then the date claimed by the plaintiff could only be as the result of a mistake, and it was certainly proper for the jury to consider the probability of a mistake in reaching a conclusion. The jury, by a special finding, returned that the limit of the ticket was 1899, and in view of the evidence on that point the question excluded was very important. In view of another

trial, it is proper to add that, in our judgment, the special finding of the jury that unnecessary force was used to remove the plaintiff from the train is clearly without support.

The judgment is REVERSED.

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REED, MURDOCH & COMPANY, Appellees, v. BROWN BROTHERS, Appellants.

1. **Sales**: CONSIDERATION: PRE-EXISTING DEBT. A pre-existing debt is not a sufficient consideration to support a sale of personal property as against one from whom said property was fraudulently obtained by the vendor.
2. ———: ———: PROMISE OF PAYMENT. Neither will a promise to pay for goods so obtained by the vendor give title to the vendee as against the real owner.

*Appeal from Buena Vista District Court.*—HON. LOT THOMAS, Judge.

TUESDAY, OCTOBER 17, 1893.

ACTION to recover possession of certain articles of merchandise of the value of forty-nine dollars and ninety-three cents. Judgment was entered for the plaintiffs. The defendants appeal upon certificate of the trial judge, that the case involves a question of law, upon which the opinion of this court is desired.—*Affirmed.*

*Frank J. Brown and T. D. Higgs, for appellants.*

When a consideration entered into the contract, it became absolutely binding on the parties, even though such consideration is of the most inconsiderable character. 2 Howard, 426; Bouviers Law Dictionary, Consideration; 1 Metc. (Mass.) 84; 12 Vt. 259; 29 Ala. N. S. 188; *Clarke v. Barnes*, 34 N. W. Rep. 419. Although they obtained them by fraud, Rae & Harker had

89	454
91	603
89	454
105	408

possession of the goods in controversy, and, at the time of the purchase by appellants, had the legal title in themselves, only subject to become divested by the acts of the defrauded vendors, the appellees in this case. Cobbey on Replevin, section 416; *Root v. French*, 13 Wendell, 570; *Rowley v. Bigelow*, 12 Pick. 312; *Titcombe v. Wood*, 38 Me. 561; Benjamin on Sales [2 Am. Ed.], 395. The goods so held by the fraudulent vendee could be conveyed to an innocent third party for value, and vest in the innocent purchaser a perfect title, good against all the world; the reason being that the vendor delivering the goods, even though induced by fraud, to the fraudulent vendee, passes to him the legal title to the goods when he conveys and delivers the goods to the vendee with the intention of passing the legal title. *Clough v. The London & Northwestern R'y Co.* L. R., 7 Ex. 26; *Padden v. Taylor*, 44 N. Y. 375; Benjamin on Sales [2 Am. Ed.], p. 396; *McCarty v. Vickery*, 12 John. 348; *Mowrey v. Walsh*, 8 Cowen, 238; Cobbey on Replevin, sec. 416; *Sanger v. Waterburg*, 22 N. E. Rep. 404. And the fraudulent vendee having such legal title can convey the same to parties innocent of the fraudulent character of the purchase by the vendee. *Chicago Dock Co. v. Foster*, 48 Ill. 507; Cobbey on Replevin, sec. 416; *Hoffman v. Noble*, 6 Metc. 75; *Root v. French*, 13 Wend. 570; *Perkins v. Anderson*, 65 Iowa, 398. When one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third person to commit the fraud. *Butters v. Houghwout*, 42 Ill. 18; *Shufeldt v. Pease*, 16 Wis. 659. A valuable consideration is such as confers some benefit upon the party by whom the promise is made, or upon a third party, at his instance or request, or some detriment sustained at the instance of the party promising by the party in whose favor the promise is made. Bouvier's Law Dictionary, Consideration.

The consideration in the purchase of goods by appellant was threefold: *First*, the acknowledging payment of a pre-existing debt. *Second*, the relinquishment of a right to secure other goods untainted with the fraudulent transaction. *Third*, an agreement to account for all the goods and pay in cash the balance found due to Rae & Harker. A pre-existing debt is a valuable consideration where the goods have been actually delivered to the purchaser in good faith. *Butters v. Houghwout*, 42 Ill. 18; *Habaszthy v. Shandel*, 27 Pac. Rep. 876; *Clark v. Barnes*, 72 Iowa, 567; *Young v. Lee*, 12 N. Y. 551; *Padden v. Taylor*, 44 N. Y. Rep. 512; *Hanchett v. Kimbark*, 2 N. E. Rep. 512; *Butters v. Houghwout*, 89 Am. Dec. 711; *Hoffman v. Noble*, 39 Am. Dec. 711; *Pratt v. Coman*, 37 N. Y. 440; *Work v. Brayton*, 5 Ind. 396; *Babcock v. Jordon*, 24 Ind. 14; *Feder v. Abrahams*, 28 Mo. App. 454; *Young v. Lee*, 2 Kern, 551; *Marble Iron Works v. Smith*, 4 Duer, 376; *Gould v. Leger*, 5 Duer, 260; *Roxborough v. Mesick*, 6 Ohio St. 452; *Payne v. Brusley*, 8 Cal. 260; *McCasky v. Sherman*, 24 Conn. 605; *Blanchard v. Stevens*, 3 Cush. 162; *Shufeldt v. Pease*, 16 Wis. 659; *Woolridge v. Thiels*, Vol. 17, S.W. Rep. (Ark.); *Harbison v. Tuffts*, 27 Pac. Rep. 1014; *Henry v. Vliet*, 49 N. W. Rep. (Neb.) 1107. In *Johnson v. Barney*, 1 Iowa Rep. 531, the court says, that the rights of the holder of a negotiable instrument are the same, whether the debt for which it is transferred is pre-existing, or contracted at the time of the transfer." The same principle was again recognized in *Trustees of Iowa College v. Hill*, 12 Iowa, 462. If, then, the rule has been established that a pre-existing debt is a valuable consideration for the purchase of a promissory note, then *a fortiori*, it is a valuable consideration for the purchase of personal property, as a note is only a representative of property. *Butters v. Houghwout*, 89 Am. Dec. 410; *Shufeldt v. Pease*, 16 Wis. 659; *Root v. French*, 13

Wend. 572; *Manning v. McClure*, 36 Ill. 490. And the innocent purchaser of a fraudulent vendee is protected in his title as against the defrauded vendor. *Johnson v. Barney*, Iowa Rep. 531; *Trustees of Iowa College v. Hill*, 12 Iowa, 462; *Clarke v. Barnes*, 34 N. W. Rep. 419, 721 Iowa, 567; *Perkins v. Anderson*, 65 Iowa, 398; *Lindaue Bros. v. Hay*, 61 Iowa, 663; *Haughtaling v. Hills*, 59 Iowa, 287; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 579; *Hanchett v. Kimbark*, 2 N. E. Rep. 512. The goods being delivered, the contract was complete and a present new consideration entered into the contract; the promising to pay the balance in cash, and to account for the goods taken. In this they assumed new obligations sufficient to sustain the contract of purchase. *Clarke v. Barnes*, 72 Iowa, 567; *Hanchett v. Kimbark*, 2 N. E. Rep. 512.

C. A. Irwin, for appellees.

The relinquishment of a right to secure other goods untainted with the fraudulent transaction, certainly constitutes no consideration because in fact the purchaser, relinquished no other or different right than he would have done, had he attempted to enforce collection of this claim by attachment. In *Oswego Starch Factory v. Lendrum*, 57 Iowa, 579, it was held that this constitutes no consideration whatever. An indorsee to whom a note is transferred as collateral security for a pre-existing debt is not entitled to be considered as a purchaser for value. *Trustees of Iowa College v. Hill*, 12 Iowa, 462; *Ryan v. Chew*, 13 Iowa, 589; *Ruddick v. Lloyd*, 15 Iowa, 441; *Union National Bank v. Barber*, 56 Iowa, 559; *Bone v. Tharp*, 63 Iowa, 225. In *Oswego Starch Factory v. Lendrum*, 57 Iowa, 579, it is held that an attaching creditor is not an innocent purchaser for value as against a defrauded vendor of personal property. The creditor of the fraudulent

vendee who by agreement takes goods then in possession of such fraudulent vendee in payment of his debt, acquires no better title from a voluntary surrender of the goods than he would obtain by a levy of an attachment. In both cases the essential facts are, that the subsequent purchaser parts with no new consideration, and that the creditor is in no worse plight than before. Cobbey on Replevin, sections 285, 286; Tiedeman on Sales, section 329; *Henderson v. Gibbs*, 39 Kansas, 679; *Morrison v. Adoue*, 13 S. W. Rep. (Texas) 166; *Sleeper v. Davis*, 64 N. H. 59; *Partridge v. Rubin*, 64 N. Y. Supreme Court, 657; *McIntosh v. Hill*, 1 S. W. Rep. (Ark.) 688; *Eaton v. Davidson*, 21 N. E. Rep. (Ohio) 442; *Foster v. Ambler*, 5 S. Rep. (Florida) 263; *Hoyt v. Turner*, 4 S. Rep. (Ala.) 658; *Sargent v. Stearne*, 23 Cal. 360; *Schulein v. Hainer*, 29 Pac. Rep. (Kan.) 171; *Slagle v. Goodnow*, 48 N. W. Rep. (Minn.) 402; *Levy v. Cooke*, 21 Atl. Rep. (Pa.) 858; *Root v. French*, 13 Wend. 570; *Weaver v. Barton*, 49 N. Y. 286; *Hide v. Ellery*, 18 Md. 496; *McLeod v. Bank*, 42 Miss. 99. This court has frequently held that a pre-existing debt is not a sufficient consideration in the purchase of land, to defeat prior equities. *Phelps v. Fockler*, 61 Iowa, 340; *Kittery v. Chapman*, 36 Iowa, 350; *Sillyman v. King*, 36 Iowa, 212. In *Stevens v. Brennan*, 79 N. Y. 254, the court used the following language: "In a suit by the true owner to recover the goods against a person who claims title under the fraudulent vendee, the burden is upon the party claiming such title of proving that he is a purchaser in good faith and for value." This case is cited with approval and followed by the supreme court of Pennsylvania in *Levy v. Cooke*, 32 Atl. Rep. 858.

GIVEN, J.—The certificate upon which this appeal is taken is as follows:

"Where goods are purchased from an insolvent firm, but without any knowledge on the part of the pur-

chaser of said insolvency, to be paid for in part with a pre-existing debt, and a promise on the part of the purchaser, to pay the balance on demand, but where the balance is not demanded or paid, and a receipt given to the vendor by the purchaser for the debt, as aforesaid, and when the purchaser is told to take any goods he chooses from a large quantity, and the purchaser takes goods that were obtained by fraud on the part of the vendee, and the defrauded vendor rescinds the sale, does such a purchase constitute a purchase for value, as against the defrauded vendor?"

It is not questioned in the record, or in argument, but that the appellees had the right to, and did, rescind the contract by which they sold the goods in controversy to the appellants' vendors, Rae & Harker, and would be entitled to recover them from Rae & Harker, if still held by them. Nor is it questioned but that the appellants were innocent purchasers of the goods from Rae & Harker. The sole contention is whether they were purchasers for value, or, in other words, whether the pre-existing debt, and the promise to pay the excess of the value of the goods over the amount of the debt, was a valuable consideration, as against the defrauded vendors, the appellees.

I. We first inquire whether the pre-existing debt was a valuable consideration for the purchase. This

question is presented for the first time in this court. Though the amount in controversy is small, counsel urge the importance of the question, and have aided us in its solution by the marked care and ability with which it is presented. Cobbey, in his Law of Replevin, section 286, states the law to be as follows: "Goods obtained by fraud, and used to pay a pre-existing debt, may be replevied by the true owner. Where goods obtained by fraud are turned over to pay a pre-existing debt of the vendee, either by actual sale or by pledge, such sec-

1. SALES: consid-  
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existing debt.

and vendee is not considered as an innocent purchaser for value, as, if he is compelled to surrender the goods to the true owner, he is in no worse condition than before. In such cases it is well settled that the true owner may retake his property." See Newmark on Sales, section 205. Of the many cases which we find fully supporting this statement of the law, we cite the following, most of which are directly in point: *Root v. French*, 13 Wend. 570; *Sargent v. Sturm*, 23 Cal. 359; *Durell v. Haley*, 1 Paige, 491, 492; *Linnard's Appeal*, (Pa. Sup.) 3 Atl. Rep. 840; *Bradley v. Obear*, 10 N. H. 477; *Farley v. Lincoln*, 51 N. H. 577; *Sleeper v. Davis*, (N. H.) 6 Atl. Rep. 201; *Johnson v. Peck*, 1 Woodb. & M. 334; *Ruth v. Ford*, 9 Kan. 17; *Thompson v. Rose*, 41 Am. Dec. 121; *Dickerson v. Tillinghast*, 4 Paige, 215; *Stevens v. Brennan*, 79 N. Y. 254; *Poor v. Woodburn*, 25 Vt. 234; *Ratcliffe v. Langston*, 18 Md. 383; *Spira v. Hornthall*, 77 Ala. 137; *Henderson v. Gibbs*, 39 Kan. 680, 18 Pac. Rep. 926; *Eaton v. Davidson*, 46 Ohio St. 355, 21 N. E. Rep. 442. In *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573, this court held, that an attaching creditor of a fraudulent vendee parts with no consideration; that he stands in the shoes of the vendee, and can not hold the property attached, as against the defrauded vendor. The reasoning in that case is in harmony with the cases cited above.

The only cases we have discovered, holding contrary to the above mentioned cases, are *Shufeldt v. Pease*, 16 Wis. 689; *Butters v. Haughwout*, 42 Ill. 18. The appellants cited *Johnson v. Barney*, 1 Iowa, 531, and *Trustees v. Hill*, 12 Iowa, 463. In the former case it is held, in harmony with the general current of decisions, "that the rights of the holder of a negotiable instrument are the same whether the debt for which it is transferred is pre-existing, or contracted at the time of the transfer." The latter case recognizes this rule as applying to transfers of negotiable paper in payment

of a pre-existing debt, and holds that if the transfer is as collateral security for a pre-existing debt, without any new consideration, an assignee of the negotiable instrument is not a purchaser for value, in the usual course of trade. This case has been followed in *Ryan v. Chew*, 13 Iowa, 589; *Ruddick v. Lloyd*, 15 Iowa, 441; *Union Nat. Bank v. Barber*, 56 Iowa, 559; *Bone v. Tharp*, 63 Iowa, 223.

It being thus settled, as the law of this state, that a pre-existing debt is a valuable consideration for the transfer of a negotiable instrument, the appellants contend that the same rule should apply to the transfer of any chattel property. In considering this claim, we must have in mind the distinction between negotiable instruments and other chattels. It is unquestionably the policy of the law, in the interest of trade and commerce, to facilitate the circulation of commercial paper. The necessities of commerce require that bills of exchange and promissory notes shall be treated as possessing some of the attributes of money; and to give them this attribute, and to give confidence in their reception, they are protected in the hands of an innocent holder for value, before due, from defenses growing out of the dealings of the prior parties. Negotiable instruments are excepted from the rule with regard to other property. It is only he who has a title himself to a personal chattel that can convey it to another; but the *bona fide* assignee for value of even a stolen note, who takes it innocently, in the course of trade, before due, with due caution, has a valid title, although his assignor had no title whatever. It is these distinctions between commercial instruments and other property that have led the courts to hold that a pre-existing debt is a valid consideration for the transfer of a negotiable instrument. See 3 Kent's Commentaries, 79; *Eaton v. Davidson*, 46 Ohio St. 355; *Carlisle v. Wishart*, 11 Ohio, 172; *McLeod v. Bank*, 42 Miss. 112.

In *Swift v. Tyson*, 16 Pet. 1, Justice STORY, after reviewing the authorities, and holding that a pre-existing debt does constitute a valuable consideration for the transfer of a negotiable instrument before due, gives the following reasons: "It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass, not only as security for new purchases and advances made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But, establish the opposite conclusion that negotiable paper can not be applied in payment of, or as security for, pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then, by circuitry, to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security, to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts. This question has been several times before this court, and it has been uniformly held that it makes no difference whatsoever, as to the rights of the holder, whether the debt for which the negotiable instrument

is transferred to him is a pre-existing debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument."

*Manning v. McClure*, 36 Ill. 490, cited, only determines that a negotiable note taken as collateral security for a pre-existing debt was taken for value. The question under consideration was not involved in that case. We think it is entirely clear, upon reason and from these authorities, that while, from the necessities of the case, and the nature of negotiable instruments, a pre-existing debt is a valuable consideration for their transfer, it should not be so held as to other personal property.

II. It only remains to determine whether the promise to pay the excess of the value of the goods over the amount of the debt is such a valuable consideration as will sustain the transfer. We have seen that, where a prior debt is the only consideration, it is held not to be a purchase for value, because the purchaser parts with nothing; that, if he is compelled to surrender the goods to the true owner, he has his claim against his debtor, and is in no worse position than before. The same reasons apply to this promise to pay the difference. If, as some of the cases hold, Rae & Harker had no title to the goods that they could transfer, as against the appellees, then there was no consideration for the promise to pay this difference.

The question certified is whether this purchase by the appellants constitutes a purchase for value, as against the defrauded vendors. Our conclusion is that the question must be answered in the negative, and the judgment of the district court AFFIRMED.

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payment.

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JESSE BUCY *et al.*, Appellees, v. PITTS AGRICULTURAL  
WORKS, Appellants.

**Sale: WARRANTY: BREACH: EVIDENCE.** Where in an action for damages for a breach of the warranty implied by law in the sale of a threshing machine, the defendant's answer was a general denial of the allegations of the petition, except as to the fact of the sale, and the evidence showed an express warranty in writing by the vendor relating to the same subject and obligations as would be included in the implied warranty, but conditioned upon notice being given the vendor of any defects within one week after the machine was put in operation, *held*, that an instruction withdrawing said express warranty from the consideration of the jury was erroneous, and was prejudicial to the defendant.

*Appeal from Hardin District Court.*—HON. S. M.  
WEAVER, Judge.

TUESDAY, OCTOBER 17, 1893.

THE following is a sufficient statement of the pleadings for an understanding of the questions presented: The plaintiffs brought this action to recover damages for the breach of an implied warranty in the sale to them of a threshing machine. The implied warranty relied upon was that the machine was suitable for the purpose for which it was purchased, namely, for threshing grain. The breach alleged is that the machine was defective and unfit for use, in that the cylinder boxes would heat, and the machine carried over grain with the straw. They also alleged in this petition that the machine was sold to them without any express warranty. Before answer was filed, they amended, alleging that at the time of the sale the machine was orally warranted by the defendant's agent of whom the machine was purchased "as being a good machine, capable of doing good threshing, well made, and that the machine would thresh equal with any other

machine of any manufacture, and that it was made of good material, and would work perfectly in all particulars." They also alleged in said amendment that they relied upon said statements and the implied warranty, and that said allegation that there was no express warranty was made through a misunderstanding, the plaintiffs meaning thereby that there had been no written warranty. The defendant answered, admitting the sale of the machine to the plaintiffs for the purpose of threshing grain, and denying the other allegations. The case was tried to a jury, and resulted in a verdict and judgment for one hundred and fifty dollars for the plaintiffs. The defendant appeals.—*Reversed*.

*Huff & Ward*, for appellant.

*C. E. Albrook*, for appellees.

GIVEN, J.—On the trial the appellant introduced in evidence, without objection, an order to the appellant upon a printed blank, filled up in writing, for a threshing machine, and purporting to be signed by the appellees. There was evidence tending to show that the appellees had signed the order. They testified that they did not remember of doing so. Said order contains the following: "The Pitts Agricultural Works warrant said machine to be of good materials, and to be well made; to do good work in threshing and cleaning grain, if properly managed. The condition of warranty is that notice of any defect is to be given the Pitts Agricultural Works at Buffalo, New York, within one week after putting the machine in operation."

The case was submitted as upon the implied warranty, and the jury instructed that "the only question for you to consider is whether the threshing machine did or did not comply with this implied undertaking,

and, if not, then what damages, if any, the plaintiffs have thereby sustained." In respect to said warranty in the written order, the court instructed as follows: "The printed warranty contained in said paper is not involved in this action, and you will not allow it any weight or influence in your deliberations. \* \* \* The controversy in this case turns on the implied undertaking of the defendant; that is, the undertaking or promise which the law attaches to such sales whenever such implication is not inconsistent with the express terms of the writing. The implied warranty in this case is not inconsistent with the writing offered in evidence."

The effect of this instruction was to withdraw the written warranty from the consideration of the jury, and of this the appellant complains, contending that it was proper evidence, under section 2704 of the Code, which is as follows: "Under a denial of an allegation, no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegation is bound to prove." To apply this rule, we must ascertain what controverted allegations, that the appellee was bound to prove, this evidence tended to negative.

There are authorities holding that, where there is an express warranty, none will be implied, upon the theory that by the express warranty the parties have stated, in words, that by which they agreed to be bound. It is held, in this and many other states, that this rule does not extend to the exclusion of warranties implied by law where they are not excluded by the terms of the contract. "A warranty will not be implied in conflict with the express terms of the contract." *Blackmore v. Fairbanks, Morse & Co.*, 79 Iowa, 282. The rule deducible from the authorities is that an implied and an express warranty may exist under the same contract, as when the expressed does not relate to the obli-

gations created by the implied; but when the expressed warranty does provide as to the same obligation, it excludes the implied. In other words, the law will not imply anything as to matters about which the parties have expressly agreed. It is not clear to our minds why, under the pleadings, the case was submitted as upon an implied warranty, and not upon the alleged oral warranty, which, as is alleged, covered all and more than the implied warranty. No complaint is made upon this precise point. Therefore we inquire whether, under the case as submitted, the appellant was entitled to have the written warranty considered by the jury.

The appellees alleged, and because of the appellant's denial were bound to prove, an implied warranty, an obligation that was not lessened by the fact that they might prove it by showing a contract from which the law would imply a warranty that the machine was reasonably suited for its intended purpose. If the appellant had offered a written contract wherein the appellees had agreed to take the machine as it was without any warranty, its admissibility would hardly be questioned, because it would tend to negative the controverted allegations that there was an implied warranty, and that there was no written warranty. The printed warranty introduced by the defendant had the same tendency. It relates to the same subject and obligations that an implied warranty would, and, under the law, became the contract, to the exclusion of all implications as to that subject or those obligations. It directly negated the existence of the implied warranty, and equally so the alleged oral warranty, as the writing must be taken as expressing in full the agreement of the parties. It can not be said that the exclusion of this evidence was without prejudice to the appellant. The appellees had no right to recover upon any other than the contract of

warranty upon which they purchased, and surely the appellant was not chargeable upon any other than that upon which the sale was made. If these different warranties were identical in effect, if the same liability existed under each, it might be said with some plausibility that there was no prejudice; but such is not the case. All that the law would imply was that the machine was of such material and construction that, with fairly skillful handling and usage, it would do ordinarily good work; or, in other words, that it was reasonably suited to the purpose for which it was intended. Under the oral warranty alleged, the appellant warranted the machine to be all this, and that it would thresh equal with any other machine of any manufacture, and would work perfectly in all particulars. The printed warranty, though not differing materially from what, in its absence, the law would imply, contains, as a condition of the warranty, that the appellant was to have certain notice of any defects within a time named. If the printed warranty was the contract of the parties, it was certainly prejudicial to deny the appellant the benefit of this condition.

Our conclusion is that the judgment of the district court must be REVERSED.

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ROGERS & MAGUIRE, Appellees, v. ELLA IRWIN CHASE  
*et al.*, Appellants.

**Conveyances of Real Estate:** CONSTRUCTION: RECORD. C., having purchased certain real estate with funds belonging to the estate of I., conveyed the same to I.'s widow, who, in turn, conveyed it to the executor of I.'s estate. Each of said conveyances purported on its face to convey in the grantor's own right, and there was no indication in either of them that the conveyance was in trust. After the death of I.'s widow, said executor conveyed said land to E. C., R. M., L. M. and E. M., the only surviving heirs of I., jointly; the first of whom, under the laws of descent, was entitled to one half of said property, and the others to the remaining half, but their respective interests were not specified in the deed. Thereafter L. M. and E. M. quitclaimed

their respective interests to R. M., who conveyed to the plaintiffs by deed reciting, that he had granted, bargained, sold, etc., all of his right, title and interest in the property described. *Held*, that the deed to the plaintiffs was in effect a quitclaim deed, and that the plaintiffs took thereunder only the interest of R. M., which was an undivided one half.

*Appeal from Dickinson District Court.*—HON. LOT THOMAS, Judge.

TUESDAY, OCTOBER 17, 1893.

ACTION to partition the west half of section 26, the west half of section 35, and the northwest quarter of the southeast quarter of section 35, township number 99, range 37, in Dickinson county, Iowa. The land is owned by the plaintiff and the defendant Ella Irwin Chase, and a controversy in the case is as to the extent of their respective interests; the plaintiff firm claiming a three fourths interest, and the defendant a one half interest, and hence the controversy is as to the ownership of the one fourth interest. Charles D. Chase is the husband of, and a codefendant with, Ella Irwin Chase. There is no controversy as to the title to the land prior to June 14, 1872, when the Des Moines Valley Railroad Company conveyed it to Charles D. Chase. The plaintiff's claim is based upon a title following the conveyance to Chase, as follows, as indicated by the records of Dickinson county:

"Fourth. A deed from Charles D. Chase and wife to Clara C. Irwin; fifth, a deed from Clara C. Irwin to B. H. Ferguson; sixth, a deed from Benjamin H. Ferguson and wife to Ella Irwin Chase, Robert I. Marston, Laura M. Marston and Ella C. Marston; seventh, a deed from Laura M. Marston and Ella C. Marston to Robert I. Marston; eighth, a mortgage from Robert I. Marston to Frank I. Maguire and Nathaniel P. Rogers, Jr. (this is the mortgage held by the appellee, Nathaniel P. Rogers, Sr.); ninth, a deed from Robert

I. Marston to Frank I. Maguire and Nathaniel P. Rogers, Jr.”

There is no dispute as to the fact that such conveyances were made, but their legal effect, because of their character, is in question. Robert Irwin died in 1865, leaving a widow, Clara C. Irwin, and two children, viz.: Ella Irwin Chase, the defendant, and Eliza J. Marston. Robert Irwin lived and died in Illinois, and one B. H. Ferguson was the executor of his estate. It is the claim of the defendants, and we think the facts are established by competent evidence, that the purchase of the land by Chase was with money belonging to the estate of Robert Irwin, and for the estate. The land was conveyed by Chase to the widow, Clara C. Irwin, and by her to the executor, Ferguson. No consideration whatever was paid for either of these conveyances, but they were made because each held the land as that of the estate. Clara C. Irwin, the widow, died in 1884, and Eliza J. Marston is also deceased. Eliza J. left three children, Robert I., Laura M. and Ella C. Marston. Some confusion as to facts may be avoided if it is here understood that the heirs of Robert Irwin at this time are the defendant, Ella Irwin Chase, and the three children of her deceased sister, viz., Robert I., Laura M., and Ella C., and under the law of descent the land would go, one half to the defendant, and the other half to the three children of her sister. None of the conveyances in any way indicated on their face that the grantee took the title in trust. The particular character of the conveyances will be noticed in the opinion. On the twenty-third of April, 1888, B. H. Ferguson, executor, conveyed the land to Ella Irwin Chase, Robert I. Marston, Laura M. Marston and Ella C. Marston, jointly; that is, specified no interest as to each. On the fourth day of May, 1888, Laura M. and Ella C. Marston executed to Robert I. Marston a quitclaim deed of their interest in the land.

On the eighth day of May, 1888, Robert I. Marston made to Fank I. Maguire and Nathaniel P. Rogers, Jr., who compose the plaintiff firm, a mortgage of his interest in the land, and on the twenty-second day of the same month he made a deed to them of his interest in the land. Maguire and Nathaniel P. Rogers, Jr., assigned the mortgage to Nathaniel P. Rogers, Sr., who is a defendant in this case, and he asks to have his mortgage lien attached to whatever interest shall be decreed to belong to the plaintiff. The district court decreed a three fourths interest in the plaintiffs, and the defendants, except Nathaniel P. Rogers, Sr., appeal.—*Reversed*.

*Parker & Funk*, for appellants.

*Cummins & Wright* and *J. W. Cory*, for appellees.

GRANGER, J.—A controlling question in the case seems to be as to the effect of the condition of the title to the land in Dickinson county. The fact is beyond question, independent of the record, that the title, as it rested in Ferguson, was in trust for the heirs of Robert Irwin, and that, as such heirs, Ella Irwin Chase, defendant, owned an undivided one half, and the children of Eliza J. Marston the other half, which, upon the conveyance by Laura M. and Ella C. Marston of their interest, vested Robert I. Marston with an undivided one half; and this is what he actually owned when he conveyed his interest to the plaintiffs. It will be well to now notice the language of the deed as to what it purports to convey. It is as follows:

“Party of the first part, for and in consideration of the sum of one dollar, \* \* \* has granted, bargained, sold, aliened, demised, released, conveyed, and confirmed, and by these presents does grant, bargain, sell, alien, demise, release, convey, and confirm, unto the parties of the second part, to their heirs and

assigns, forever, all of the right, title and interest of the party of the first part in and to the west half," etc. (here follows balance of description of premises), "hereby releasing and waiving all his right under the homestead exemption laws of the said state of Iowa, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the first part, in and to the above described and mentioned property, and every parcel and part thereof, with the appurtenances; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said parties of the second part, forever."

The deeds from Chase to Ella C. Irwin, from her to Ferguson, and from him to the heirs, each conveys the interest of the grantor without any specification whatever as to what the interest is. Whatever might be the legal construction upon the language used, the deeds were evidently, at the time of execution, intended by the parties as quitclaim deeds. It should be here stated that each of the deeds referred to from Chase to Robert I. Marston, on its face, purported to convey to the grantee named therein, in his or her own right, the interest specified in the deed; that is, there were no words indicating a trust or representative relationship. It should also be stated that nothing in any conveyance indicates, nor is it in any way apparent of record, that Robert Irwin in his lifetime, or that his estate, was possessed of the land. The evidence as to such interest is exclusively by parol.

There is a dispute of fact as to whether or not Marston, pending the negotiations, represented his

interest to be one half of three fourths. In view of the conflict in the evidence as given by the witnesses, and the fact, which is quite significant, that such an interest is not specified in the deed, we are of the opinion that the representation of a three fourths interest was not made.

If the decree below is to be sustained, the legal effect is to take a one fourth interest belonging to the defendant Ella Irwin Chase from her, and give it to the plaintiffs, because of the conveyance to them by Robert I. Marston of his interest. Independent of the record, there could be no claim that the deed by Marston conveyed more than his actual interest, for that is all it purports to convey, conceding it to be more than a quitclaim deed. The appellees' position, then, is that, having purchased Marton's interest, they had a right to rely on the record for the extent of such interest, which is three fourths. There are no facts in the case because of which Ella Irwin Chase should be bound by the transaction between Marston and the plaintiffs; that is, no fault is attributable to her by which the plaintiff firm was induced to make the purchase, except, perhaps, that of permitting the records to show as they did. With a careful review of the authorities cited, we find none sustaining a rule that where one party conveys to another his interest in land, without any specification of a particular interest, the law will infer the extent to be that indicated by the public records. This deed does not purport to convey an interest "as indicated by the records." As to the extent of the interest, the deed is not more comprehensive than a quitclaim deed, for it contains precisely the same limitation, being "all of the right, title, and interest" only of the grantor. The deed is, in legal effect, a refusal to fix an extent of interest, and is accepted with such conditions. If to the granting clause of the deed were added those of seizin and war-

ranty, under authority, the effect would not extend the grant beyond the actual interest expressed.

In *Hoxie v. Finney*, 16 Gray, 332, there was a conveyance by the defendant of "all his right and title" to certain described premises. The deed contained "covenants that he was lawfully seized in fee of the afore-granted premises; that they were free of all incumbrances, that he had good right to sell and convey the same; and that he would warrant and defend them to the grantees," etc. The action was of contract upon the covenants of warranty, after ejectment under a mortgage lien, and a recovery was denied, the court saying: "A deed of all my right, title, and interest in certain real estate purports to convey merely such right as the grantor had in the land; and, as the grantor conveys his own title only, the general covenants of seizin, \* \* \* and that he will warrant and defend the same against the lawful claims and demands of all persons, are all qualified and limited by the granting clause." That deed is as comprehensive in all respects as the one from Marston, and, in many respects, much more so, and it is there held that the express language of seisin in the deed will not so enlarge or modify the granting clause as to impress the instrument with an intent to convey an absolute interest. See, to the same effect, *Cummings v. Dearborn*, 56 Vt. 441; *Allen v. Holton*, 20 Pick. 458; *Sweet v. Brown*, 12 Metc. (Mass.) 175; *Bowen v. Thrall*, 28 Vt. 382; *Brown v. Jackson*, 3 Wheat. 449. In *Knight v. Campbell*, 76 Iowa, 730, in a conveyance, the granting words are as follows: "Have remised, released, sold, and conveyed and quitclaimed, and by these presents do remise, release, convey, sell, and quitclaim, \* \* \* all the right, title, and interest, claim, and demand, which the said party of the first part have," etc. It is said in the opinion: "It is very apparent, we think, that this instrument is a mere

relinquishment or conveyance of such right or interest in the land as might then remain" in the grantor. "It does not purport to be more than that. The grant is of his right, title, and interest in the premises, and the question whether anything passed by it depends entirely upon whether he then had any right or interest in it." There are many similar cases. The cases turn upon the thought that the language of such a grant manifests the intent of the parties to the instrument, and does not permit the other language in the instruments, indicative of a different intent, to override it. Can it be reasonably claimed, then, that, if the parties, by such language in the instrument, as between themselves, do not enlarge the language of such a grant, the records of the county may operate to do so, and that to the extent of divesting the title of third parties?

This court has, in one or two cases, said that where, in addition to the word "quitclaim," the words "sell and convey" are used in a conveyance, it is not a "mere quitclaim deed." *Sibley v. Bullis*, 40 Iowa, 429; *Willson v. Irish*, 62 Iowa, 260. Without commenting on the significance of the language there used, it is sufficient to say that the expressions in no way militate against the rule of the cases cited. It is sufficient to say that the recording act was designed to protect "purchasers for a valuable consideration without notice," but only to the extent that they are purchasers. It is not the office of the act to in any way enlarge or change the intent of the parties. In this case the intent was, as we have seen, to convey the interest of Marston, and not more. That was a one half interest. The cause will be remanded to the district court for a confirmation of shares on that basis, and the lien of the defendant Nathaniel P. Rogers, Sr., will attach to the share of the plaintiffs. REVERSED.

89 476  
135 522

MAX HOWEGLER, Appellee, v. LEE GREINER *et al.*,  
Township Trustees, and MART STOVER, Township  
Clerk, etc., Appellants.

**Road Supervisors: PAYMENT FOR LABOR: CONSTRUCTION OF STATUTES.**

Where upon a final settlement of the road supervisors with the township trustees, as provided in section 996 of the Code, a balance is found to be due a supervisor for his personal labor, and there are no funds in the hands of the clerk to pay such balance, the supervisor is entitled only to receive a certificate for the amount of labor performed, which may be used in the payment of his own highway tax for any succeeding years, as provided in section 3, chapter 200, of Acts of the Twentieth General Assembly; he is not entitled to an order payable in money from funds afterwards appropriated or belonging to his district.

*Appeal from Hamilton District Court.*—HON. S. M.  
WEAVER, Judge.

TUESDAY, OCTOBER 17, 1893.

ACTION in equity to compel the defendants, as township trustee and township clerk, to issue to the plaintiff an order, payable in money, for a balance due him as road supervisor. A demurrer to the petition was overruled, and, the defendants standing thereon, judgment was rendered against them, from which they appeal.—*Reversed.*

A. N. Boeye, for appellants.

Wesley Martin, for appellee.

KINNE, J.—This cause, involving less than one hundred dollars, comes to us upon the certificate of the trial court as follows:

“*First.* Where, upon the settlement provided for by section 996 of the Code of 1873, a balance is found

to be due a road supervisor upon his own personal labor as such supervisor, and there are no funds in the treasury with which to pay him such balance, is he entitled to receive the order provided for by section 997 of the Code of 1873, or the order provided for by section 3, chapter 200, of Acts of the Twentieth General Assembly (McClain's Code, section 1500; Code 1873, section 986)? *Second*. Is the road supervisor in such case entitled to demand and receive an order payable in money from the funds afterwards appropriated or belonging to his district? Or, *third*, is the certificate mentioned in said section 3, chapter 200 of Acts of the Twentieth General Assembly, the only compensation or payment he is entitled to receive?"

The decision of the questions certified involves a construction of sections 996 and 997 of the Code (McClain's Code, sections 1510, 1511) and of section 3, chapter 200, of Acts of the Twentieth General Assembly (McClain's Code, section 1500). They read as follows:

"Section 996. The supervisors are required to meet the township trustees at their meeting on the first Monday in October in each year, at which time there shall be a settlement of the accounts of such supervisors connected with the highway fund, for putting up guide boards and for any other services; and after payment of the supervisors, the trustees shall order such a distribution of the fund in the hands of the township clerk, as they may deem expedient for highway purposes, and the clerk shall pay the same out as ordered by the trustees.

"Section 997. Should there be no money in the treasury on final settlement of the supervisors with the trustees, said trustees shall order the township clerk to issue orders for the amount due the supervisors. The orders so issued shall be numbered with the number of the district to which they belong, and shall be received

the same as money in the payment of highway tax in the district to which they are issued.

"Section 3, chapter 200, Acts of Twentieth General Assembly: The supervisors shall be allowed the sum of two dollars per day for each day's labor, including the time necessarily spent in notifying the hands and making out his return, which sum shall be paid out of the highway fund, after deducting his two days' work. When there is no money in the hands of the clerk with which to pay the said supervisor, he shall be entitled to receive a certificate for the amount of labor performed, which certificate will be received in payment of his own highway tax for any succeeding year."

We think these various provisions of the law may be so construed as to give each force and effect, and at the same time carry out what we believe was the legislative intent. It will be observed that section 997 of the Code treats of the district fund, while section 3, chapter 200, Acts of the Twentieth General Assembly, refers only to the per diem of the supervisor. We think the proper construction to be placed upon these statutes is that section 996 of the Code contemplates a settlement between the trustees and the supervisor of the accounts of the latter connected with this general or highway fund, including the expense of putting up guide-boards, and for any other proper expenses connected with that fund, and for all such, if there is no money, an order issues. If the supervisor has paid for material of the character indicated, then the order would issue to him; if not, then to the person furnishing the material; and these orders would, under section 997, be payable out of the district funds, when collected, and, at the option of the holders, might be turned in in payment of highway taxes in the district where issued. Under section 3, chapter 200, of Acts of the Twentieth General Assembly, which, as we have said, relates only to the per diem of the supervisor, in case there is no money in

the hands of the clerk, a certificate issues to him for the amount due him for personal labor, which is payable only as provided therein, viz., by applying it in payment of his own highway tax for any succeeding year. This construction gives effect to all the provisions of the statute, and we think is in accord with the legislative intent. The only reason we can see for the distinction thus made by the legislature was to deter road supervisors from putting in unnecessary time, which would be more likely to be done in case they could rely upon funds to be collected in future years. There is nothing in *Tobin v. Township of Emmetsburg*, 52 Iowa, 81, in conflict with the view herein expressed.

It is contended that our construction of the statute is in conflict with the holding in *Bradley v. Love*, 76 Iowa, 397. In that case the action was based upon orders issued to supervisors under Code, section 997, and it was sought to compel their payment out of the general township road funds. That was the only question involved, and it was held that the amounts due were not payable out of that fund. True, it is said in the opinion, that the holder of the orders "must be content with using them in the payment of road taxes, or *await such time as there are funds on hand, belonging to the respective districts, with which they may be paid.*" It does not appear, in that case, that the orders were for the personal services of the supervisors. They may have been issued in payment of moneys actually paid out by the supervisors to other persons for labor, in which event the italicized language was appropriate, and in no way in conflict with the views we have expressed. Indeed, we are constrained to think such was the fact, as it is said in the opinion that the orders were issued under section 997 of the Code. As that section does not relate to the personal services of the supervisor, the two cases do not involve the same question.

In answer to the first question certified, we say the supervisor is entitled to a certificate as provided in section 3, chapter 200, of Acts of the Twentieth General Assembly. The second question must be answered in the negative. The third question must be answered in the affirmative. For the error of the district court in overruling the demurrer, the case is REVERSED.

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WM. ROTCH *et al.*, Trustees, Appellants, v. HUMBOLDT COLLEGE *et al.*, Appellees.

1. **Judgment: COLLATERAL ATTACK: JURISDICTION: ORIGINAL NOTICE: DEFECTIVE SERVICE.** A judgment is not subject to collateral attack because of the defective service of the original notice, where the judgment recites that the defendant had due and legal service of the pendency of the action.
2. ———: ———: ———: **FILING PETITION: RECORD.** Notwithstanding the provision of section 200 of the Code, that no pleading shall be considered filed until a memorandum of the date of filing has been entered on the appearance docket, a judgment rendered in a cause without such entry having been made is not void, and is not subject to collateral attack on such ground.

*Appeal from Humboldt District Court.*—HON. LOT THOMAS, Judge.

TUESDAY, OCTOBER 17, 1893.

ACTION in equity to subject certain land to the payment of a judgment in favor of the plaintiffs. There was a hearing on the merits, and a judgment in favor of the defendants for costs. The plaintiffs appeal.—*Affirmed.*

*Prouty, Coyle & Prouty*, for appellants.

*P. Finch*, for Humboldt County Bank, appellee.

*R. M. Wright*, for D. K. Pearsons, appellee.

ROBINSON, C. J.—The defendant Humboldt College is a corporation which has existed for more than twenty years. Before the year 1876 it was known as the Humboldt College Association, and also as the Humboldt Collegiate Association, the name being used interchangeably. In June, 1871, the association gave its promissory note, payable to O. Prescott and others in June, 1876. In August, 1882, the note was extended to August, 1885. In November, 1889, the plaintiffs recovered judgment on the note against the association for the sum of sixty-five thousand, six hundred and thirty-seven dollars and fifty cents. An execution was issued, and forty thousand dollars were received to apply on the judgment. The remainder is unsatisfied.

In March, 1880, John McLeod recovered against the association judgment for the sum of nine hundred and seventy-eight dollars and eighty-six cents and costs. An execution issued on that judgment was levied upon two forty acre tracts of land in Humboldt county, then owned by the association, which were sold under the execution. Redemption from the sale not having been made, a sheriff's deed for the land was executed to McLeod in June, 1882. In May, 1883, he conveyed it to Estella B. Fuller. A few days later she gave a mortgage thereon to D. K. Pearsons, guardian, to secure the payment of a note for five hundred dollars. In September, 1889, the mortgage was foreclosed, and the land was ordered sold to satisfy the sum of six hundred and forty-eight dollars and eighty-four cents and attorney's fee and costs, which were adjudged to be due on account of the note. Under an execution issued to satisfy the judgment, one of the tracts of land was sold to the defendant Pearsons, and the other to one P. Finch, who afterwards transferred the sheriff's certificate of sale to the defendant, the Humboldt County Bank. In December, 1890, a sheriff's deed was issued

to the bank for the tract sold to Finch, and in February, 1891, a sheriff's deed was issued to Pearsons for the tract sold to him. In March, 1891, this action was commenced to subject the two tracts to the payment of the unsatisfied portion of the judgment in favor of the plaintiffs. They contend that the judgment in favor of McLeod was void and of no effect. The college is insolvent.

I. The first objection urged to the validity of the judgment in favor of McLeod is that the district court of

Humboldt county did not have jurisdiction to render it, for the reason that notice of the action was not served on the college, and judgment was rendered without an appearance for it. There are two answers to that objection, one of which may be stated as follows:

1. JUDGMENT:  
collateral attack:  
jurisdiction: original  
notice: defective service.

A notice was in fact served on the college. The record as it now exists tends to show that it was defective, but the court found "that due and legal service had been had on the defendant of the pendency of said cause." It is the well settled rule in this state that where a defective notice or defective proof of the service of a notice is adjudged by the trial court to be sufficient, the judgment rendered thereon can not be attacked collaterally. *Woodbury v. Maguire*, 42 Iowa, 339, 342, and cases therein cited; *Shawhan v. Loffer*, 24 Iowa, 217, 226; *Tharp v. Brenneman*, 41 Iowa, 251, 253; *The Farmers Insurance Co. v. Highsmith*, 44 Iowa, 330; *Lees v. Wetmore*, 58 Iowa, 170, 177; *Bunce v. Bunce*, 59 Iowa, 533, 535; *Stanley v. Noble*, 59 Iowa, 666, 669; *Fanning v. Krapfi*, 68 Iowa, 244, 248; *Gray v. Wolf*, 77 Iowa, 630, 631. The other answer to the objection is that the parties have stipulated that the collegiate association "was duly and legally served with original notice."

II. The objection to the judgment on which the plaintiffs chiefly rely is that the filing of the petition

2. —: —: —: was not noted in the appearance docket.  
filing petition:  
 record. Section 200 of the Code is as follows:

“The clerk shall, immediately upon the filing thereof, make in the appearance docket a memorandum of the date of the filing of all petitions, demurrers, answers, motions, or paper of any other description in the cause; and no pleading of any description shall be considered as filed in the cause, or be taken from the clerk’s office until the said memorandum is made.” The petition in the *McLeod case* was delivered to the clerk for filing, and he indorsed it as filed, but made no memorandum thereof in the appearance docket. The plaintiffs contend that by reason of his failure to make such memorandum the court had no jurisdiction of the subject-matter of the action, hence that its judgment was void.

In the case of *Padden v. Moore*, 58 Iowa, 703, it appeared that certain garnishees were required to appear in court on a day specified. They went to the town in which the court was held on that day, but, being informed that the court had adjourned, they returned to their homes and gave the matter no further attention. The court had adjourned on the day before that on which they were required to appear to some subsequent date. After that adjournment a commissioner was appointed, without notice, to take the answers of the garnishees, and a day was fixed for them to answer. They did not appear, and the commissioner so reported. A default was afterwards entered against the garnishees, and judgment entered against them without notice. At a later term of court notice was served on them to show cause why execution should not issue on the judgment. In response to that they presented to the clerk a paper containing a showing why execution should not issue, which was, in effect, a protest against the action of the court in rendering judgment against them, on the ground that it lacked jurisdiction to do so. The paper

was marked as filed, but the filing was not entered on the appearance docket, and the paper was not left with the clerk. This court held that the showing so made by the plaintiffs was not an appearance by them to the proceeding; that the showing was not filed, because no memorandum thereof was made in the appearance docket, and that it did not become a part of the records of the court. The question involved in that branch of the case was whether the showing made operated to give the court jurisdiction and render valid the judgment which before had been void. This court answered the question in the negative by holding that there had been no appearance in the case within the meaning of section 2626 of the Code. Under the facts in that case it may well have been said that there was no intention to make the showing a part of the record. The facts involved in the two cases are so unlike that the decision in the *Padden case* can not be regarded as controlling in this.

In *Nickson v. Blair*, 59 Iowa, 531, a motion to dismiss the action made by the defendant, and based upon the fact that no memorandum of the date of filing the petition had been made in the appearance docket, was sustained, and this court held the ruling to be correct. It may be said of that case that advantage was taken of the defect in the proceedings by a direct attack, made in due time. This court has never held that a judgment rendered in a case in which the filing of the petition was not noted in the appearance docket is void.

Section 2599 of the Code provides that actions in a court of record shall be commenced by serving the defendant with a notice informing him that, on or before a date therein named, a petition will be filed in the office of the clerk of the court wherein suit is brought. Section 2600 provides that "if the petition is not filed by the date thus fixed, and ten days before the term, the action will be deemed discontinued." In *Hudson v.*

*Blanford*, 22 Iowa, 323, the action of the district court in discontinuing a cause, for the reason that the petition was not filed within the time fixed by the notice was sustained. In *Cibula v. Pitts Sons' Manufacturing Co.*, 48 Iowa, 528, the district court overruled a motion to dismiss the petition because not filed until after the time specified in the notice. This court, in reversing the judgment of the district court, held that the language of section 2600 is imperative, and, unless the defendant waive the noncompliance with the terms of the notice, the action must be discontinued. It was said, in effect, in *Clark v. Stevens*, 55 Iowa, 361, 362, that under the provisions of this section, if the petition is not filed within the time fixed in the notice, the action is dismissed by operation of law, without an order of the court to that effect. Yet in *Brown v. Mallory*, 26 Iowa, 469, 470, it was held that the failure to file the petition until after the time stated in the notice did not operate to avoid the judgment rendered after it was filed, but that the error could only be corrected by appeal, or in other ways pointed out by the statute. In *Hildreth v. Harney*, 62 Iowa, 420, 421, it was held that the failure to file the petition within the time required by the notice did not make the judgment rendered thereon void. See, also, *Oliver v. Davis*, 81 Iowa, 287, 289.

The doctrine of the cases cited is applicable to the facts in this case. The petition was delivered to the clerk to be made a part of the records of the case, and was marked "Filed," and retained by him. The service of the original notice had given the court jurisdiction of the college, and the petition was before the court, and its action thereon was demanded. Whether it had the right to act was one of the questions it was necessarily required to decide before it rendered judgment. If that decision was erroneous, under the facts stated, it could be corrected only by direct proceedings for that

purpose. See *Lees v. Wetmore*, 58 Iowa, 170, 177; 1 Black on Judgments, section 274; Wells on Jurisdiction, sections 61, 62. It follows that the judgment rendered was not void, and, as it has not been set aside or modified in the manner provided by the law, it must be deemed valid. The judgment defendant waived its right to object to the defect in the proceedings, and the plaintiff can not now take advantage of it.

The judgment of the district court is **AFFIRMED**.

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**B. F. NEWCOMER v. JAMES TUCKER.**

**Liquor Nuisance: INJUNCTION: CONTEMPT.** A tenant can not be charged with contempt for the violation of an injunction of which he has no knowledge, restraining the owner of premises alone from the maintenance of a nuisance by the illegal sale of intoxicating liquors thereon.

*Certiorari to Winneshiek District Court.*

**TUESDAY, OCTOBER 17, 1893.**

**THIS** is a proceeding in contempt for the violation of an injunction against one Joseph Lamm, restraining him from keeping and maintaining a nuisance by the sale of intoxicating liquors. The district court held the defendant to be in contempt, and assessed a fine against him. The defendant sued out a writ of *certiorari*, and asks that the proceeding and judgment be reversed by this court.—*Writ sustained.*

*John B. Kaye*, for plaintiff.

*Geo. W. Adams*, for defendant.

**ROTHROCK, J.**—The decree enjoining Joseph Lamm from maintaining the nuisance was entered in the district court in the month of February, 1887, and said decree was made perpetual on the seventh day of

April, in the same year. That part of the decree material to the present inquiry was as follows:

“That a temporary injunction issue against the said Joseph Lamm, enjoining and restraining the said Joe Lamm from selling intoxicating liquors unlawfully on the following described premises, to wit: A certain building or buildings situated upon lot eight, of block two, of Decorah, in Winneshiek county, Iowa, and restraining the said Joe Lamm from using and occupying said above described premises, and the buildings thereon, for the purpose of keeping, selling, giving away, or storing therein or on said premises, any intoxicating liquors in violation of law.”

This proceeding in contempt was commenced in September, 1891. It appears from the record that Tucker, the defendant herein, was a lessee of the premises, and in possession thereof as the tenant of Lamm; but it does not appear that he had any knowledge of the injunction. The case appears to be in all respects like *Buhlman v. Humphrey*, 86 Iowa, 597, where it was held, that a subsequent purchaser of the premises, or his lessee, was not liable for the violation of the injunction, because he was not within the terms of the decree. In that case counsel for the attachment for contempt insisted that the case of *Silvers v. Traverse*, 82 Iowa, 52, was authority for sustaining the proceedings in contempt. But this position was not sustained by this court, because in the last named case the decree enjoined “all persons from using or occupying the premises for the unlawful keeping or traffic in intoxicating liquors.” The cases were therefore held to be distinguishable. We think that the district court rightly held that the defendant in that case was not within the terms of the decree.

It is due to the learned district judge who decided this case to say that the case of *Silvers v. Traverse*, *supra*, was decided by this court before the case at bar

was tried in the court below, and that there is language used in the opinion in that case, not necessary to its determination, which might seem to authorize the conclusion reached by the district court in this case. The case of *Buhlman v. Humphrey*, *supra*, was decided by this court since this case was tried and decided in the district court.

The writ of *certiorari* will be sustained, and the decree of the district court is REVERSED.

J. W. McINTOSH & SON, Appellees, v. J. U. LEE and  
MARY E. LEE, Intervenor, Appellants.

**Title to Real Estate: RESULTING TRUST: ATTACHMENT.** Where, upon an attachment of real estate as the property of the husband, the wife intervened, claiming that the property was purchased by her husband as her agent, and with her money, and that his conveyance of the same to her after the attachment was in pursuance of a promise made by him when she first discovered that the property had been taken in his name, and the wife's testimony was confirmed by that of the husband, but it appeared that some of the tax receipts were issued to the husband, that several witnesses had heard of the husband and wife speak of the property belonging to the former, that the husband contracted for the property about ten months before his marriage, made a lease of the property and received the rent, and executed a mortgage on a portion thereof, in which the wife joined to release her right of dower; that some of the statements of the wife, on the trial, were contradictory, and that she admitted having testified in a case tried in Kansas that she did not know that she owned any property in this state, *held*, that the wife's claim of title was not supported by the evidence,

*Appeal from Harrison District Court.*—HON. GEORGE W.  
WAKEFIELD, Judge.

TUESDAY, OCTOBER 17, 1893.

THE plaintiffs commenced an action against the defendant, J. U. Lee, aided by an attachment, which was levied upon certain lots in the town of Missouri Valley. Mary E. Lee intervened, claiming to be the

absolute and unqualified owner of the lots. There was a hearing on the merits, and a judgment against the intervenor, and in favor of the plaintiffs for costs. The intervenor appeals.—*Affirmed.*

*S. H. Cochran*, for appellant.

*J. S. Dewell*, for appellees.

ROBINSON, C. J.—The lots in question were conveyed to the defendant, J. U. Lee, by the Blair Town Lot & Land Company, by a deed, which was recorded July, 1883. The deed recited that it was executed in pursuance and fulfillment of a contract theretofore made on the fifth day of April, 1882. The intervenor claims that the lots were purchased for her, with her own money, by J. U. Lee, as her agent; that the deed was made to him without her actual knowledge, in order that he might more readily transfer it for her in case of a sale; that the plaintiffs knew those facts before their attachment was issued; that long before the indebtedness of J. U. Lee to the plaintiffs, on which the judgment involved in this suit was rendered, had been incurred, she had requested him to convey the lots to her, and he had promised, but neglected to do so until this action was commenced, when he conveyed them to her, as he had agreed to do. She asks that the attachment be discharged, and that she have a decree for the possession of the lots. The claims of intervenor are denied by the plaintiffs.

The intervenor is the wife of J. U. Lee. She acquired from a former husband property to the value of about fifteen thousand dollars. He died, and about two years afterwards, in February, 1883, she married the defendant. The evidence introduced in her behalf tends to show that the defendant had little, or no, property when she married him, and that he has not acquired any since. Both of them testify that the lots in con-

troversy were purchased by him for the intervenor, and with her money. She says she directed him to buy them for her, but did not know that he took the title thereto in his own name until about a month after they were purchased; that she then requested him to convey them to her, and he promised to do so; that she has paid the taxes on them since they were purchased, and that the failure to convey them to her before this action was commenced was due to negligence. Both she and her husband testify that they informed the plaintiffs before this action was commenced that she was the owner of the lots, and the testimony of two other witnesses tends to show that the plaintiffs admitted that the intervenor owned them. The testimony of the intervenor and her husband in regard to what they said to the plaintiffs with respect to the title is denied by them, and the testimony of the other two witnesses referred to was general, and somewhat indefinite. It appears that some of the receipts for the taxes on the lots, and certificates of redemption from tax sales, were issued to Mrs. Lee, but it also appears that some of the receipts were issued to her husband. Several witnesses testify that they heard Mrs. Lee and her husband speak of the lots as belonging to him. He states that he first contracted for them in February, 1881, although the deed to him indicates that it was at a later date. He leased the lots and received the rent. He executed in his own name a mortgage on one of them, in which intervenor joined to release her right of dower. Her statements in regard to the time when she discovered that the title to the lots was vested in her husband, and in regard to the reasons for the conveyance of them to her, are in some respects contradictory and unsatisfactory. She admits that she testified, in a case tried in Kansas two or more years before this action was commenced, that she did not know that she owned any property in this state. We do not understand her to claim that the

defendant acted as her agent before their marriage, but it appears that he contracted for the lots at least ten months before that event occurred. A careful examination of all the evidence in the case leads us to conclude that the decided preponderance of the evidence is against the claim of the intervenor that she was the owner of the lots when this action was commenced.

The judgment of the district court was, therefore, authorized by the evidence, and is **AFFIRMED**.

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PETER NILLES, Appellee, v. MICHAEL WELSH, Appellant.

89	491
139	350

1. **Contract to Convey Real Estate: CONSIDERATION.** The plaintiff and the defendant had agreed to purchase between them a quarter section of land, the plaintiff to take the north eighty acres, and the defendant the south eighty, at prices agreed upon. The owner of the land refusing to make separate deeds, it was orally agreed that the defendant should take the deed, make the first payment with money furnished by both parties in proportion to their respective shares, execute a mortgage for the balance, and convey the north eighty to the plaintiff, who was to pay the balance of the purchase money therefor to the defendant. *Held*, that the contract was not without consideration, nor lacking in mutuality.
2. —: **STATUTE OF FRAUDS.** The defendant having received the portion of the purchase money to be paid by the plaintiff under said agreement, and used the same for the purchase of the property, *held*, that the contract was not within the statute of frauds.
3. —: **CONDITIONS: WAIVER: SPECIFIC PERFORMANCE.** The sum paid by the plaintiff was ten dollars short of the amount agreed to be paid by him, but was received by the defendant without objection, upon the promise of the plaintiff to pay him the balance. *Held*, that the payment of the full amount at the time was waived.

*Appeal from Hamilton District Court.*—HON. S. M. WEAVER, Judge.

TUESDAY, OCTOBER 17, 1893.

ACTION to enforce specific performance of an agreement for the conveyance of land. There was a decree for the plaintiff, and the defendant appeals.—*Affirmed*.

*D. C. Chase*, for appellant.

*Hyatt & Hyatt*, for appellee.

GRANGER, J.—There is a controversy as to the facts of this case, and the evidence is very much in conflict. The following are the material facts as found by the district court: “That prior to the second day of October, 1891, said plaintiff had negotiated with the agent of Joseph R. Sharp for the purchase, at and for the sum of nineteen dollars per acre, of the southwest quarter of section number 15, in township number 89 north, of range 26 west of the fifth prime meridian, Iowa. That thereupon it was agreed between plaintiff and defendant that defendant should become the purchaser of the south eighty acres of said land from said Sharp, and plaintiff of the north eighty acres of said land; the defendant to pay for said south eighty acres at the rate of twenty dollars per acre, and the plaintiff to pay for the north eighty acres thereof at the rate of eighteen dollars per acre; each to pay his respective share of the money to be paid in advance, and of each of the deferred payments, to wit, a total of one thousand and twenty-one dollars cash in advance, and two thousand dollars in deferred payments, to be paid in five annual payments of four hundred dollars each, with interest thereon, payable annually, at seven per cent. That the plaintiff paid of the advanced payment the sum of four hundred and ninety dollars, and the defendant the sum of five hundred and twenty-one dollars. That the said Sharp refused to make separate deeds for the said land, whereupon it was agreed that the defendant should take a deed from said Sharp for all of said land, and give a mortgage thereon to secure all of the deferred payments, and upon the receipt of such deeds to convey the north eighty acres thereof to the plaintiff. That defendant received a deed of all

said land, and thereafter refused to convey the same to the plaintiff." As a conclusion of law the district court found that the defendant held the title to the eighty acres in trust for the plaintiff, and decreed a conveyance thereof as prayed. We will not discuss the evidence. The facts found by the district court are right.

I. It is urged that the contract as claimed by the appellant is without consideration, and lacking in mutuality. Surely, the payment of the

1. CONTRACT to convey real estate: consideration.

four hundred and ninety dollars, and the agreement to pay the remainder of the purchase price, are a sufficient consideration for the promise by the defendant to convey. As we find the facts, it was not the defendant's intention, when the deed was made to him, to have the entire tract, nor does it appear that he wanted more than the south eighty acres; and the agreement between the defendant and Sharp, or his agent, was consummated upon an understanding between the plaintiff and defendant that each was to have one half of the land, but it could not be so obtained; that is, Sharp would not make separate deeds, because of which the defendant took the title to all the land, agreeing to convey one half to the plaintiff. There is no lack of mutuality in such a contract. It is such a contract that when entered into could be enforced "by either of the parties against the other of them."

II. It is urged that the case comes within the statute of frauds, but the claim is based on the appellant's

2. —: statute of frauds.

theory as to the facts that no part of the purchase price was paid. The facts as we find them are that there was a payment of four hundred and ninety dollars, which fact takes the case out of the statute. Code, section 3665.

III. We may notice in this connection a claim that before specific performance is decreed there must be a

3. —: conditions: waiver: specific performance. full compliance with all the terms of the contract. By the terms of the contract the plaintiff was to pay five hundred dollars down, and the payment was really four hundred and ninety dollars, the money being obtained by loan from the bank, and the ten dollars was deducted for the interest. When the payment was made the plaintiff told the defendant that he would pay him the balance, and the four hundred and ninety dollars was accepted without objection. There was clearly a waiver of the payment at the time of the ten dollars, which the parties had the right to do.

IV. It is claimed that the contract is not sufficiently definite to justify a decree for specific performance. We do not see why. The contract, as alleged and established, is that the defendant should take the title to all instead of one half the land, and convey a specific part to the plaintiff for a specified consideration. It is true that as to some, not very important, particulars there is indefiniteness, but these particulars do not go to the merits of the case, and in no way interfere with a decree such as the court ordered. No authority cited denies specific performance in such a case. To our minds, the judgment meets the demands of justice, and it is **AFFIRMED**.

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T. E. BENBOW, Appellee, v. J. A. BOYER *et al.*,  
Appellant.

1. **Homestead: ABANDONMENT: EVIDENCE.** Where the owner of a homestead left it to go to a distant state for the benefit of his health, and to visit his children, taking with him only his ordinary wearing apparel, and leaving his household goods upon the premises, with the intention of returning thereto, and during his absence frequently expressed himself as intending to return, but after about three years he voted at an election in the state to which he had gone, and about a year thereafter he directed his household goods to be sold at public auction, *held*, that the premises retained their homestead character, at least until the time that the owner voted in the state to which he had gone.

2. ———: JUDGMENT: LIEN: DURATION: SALE PENDING SUSPENSION OF LIEN. By the expiration of ten years a judgment, held by the defendants against the owner of a homestead, ceased to be a lien while said premises still retained their homestead character, and such lien was not revived by levy until after the homestead right became forfeited, and the property had been sold by the owner. *Held*, that the grantee was entitled to hold the property free from the lien of the judgment.

*Appeal from Hardin District Court.*—HON. D. R. HINDMAN, Judge.

TUESDAY, OCTOBER 17, 1893.

ACTION in equity to enjoin the defendants from selling certain real estate. From a judgment and decree for the plaintiff. The defendants appeal.—*Affirmed.*

*Spurrier & Dowell* and *C. L. Hays*, for appellants.

*C. E. Albrook*, for appellee.

KINNE, J.—This action was brought to restrain the defendants from selling the northeast quarter of the northeast quarter of section 27, township 86, range 20, west, fifth P. M., in Hardin county, Iowa, under an execution issued out of the office of the clerk of the district of said county on March 21, 1891, on a certain judgment rendered October 10, 1878, against one C. Benbow. An injunction was issued restraining the sale. The claims of the parties may be thus briefly stated: The plaintiff claims that the real estate in question was the homestead of C. Benbow; that the judgment was never a lien upon the land; that there was an agreement between the plaintiff and the defendant, in writing, that the latter, for two hundred and ten dollars, would cancel his judgment; that the plaintiff became the purchaser of the property from C. Benbow prior to the levy of the appellants' execution thereon.

The defendants claim that the plaintiff's grantor, C. Benbow, abandoned the homestead; that this judgment became a lien thereon by levy of the execution; that no contract to cancel the defendants' judgment was made; that the defendants were delayed in the levy of their execution by the fraudulent representations of the plaintiff. We need not set out the pleadings. Other facts fully appear in this opinion. The court entered a decree and judgment making the injunction perpetual, declaring that the judgment was not a lien upon the premises, and ordering the two hundred and ten dollars, which the plaintiff had paid into the hands of the clerk of the court, paid over to the defendants, on their agreement to receive the same for their judgment.

I. Touching the homestead claim, we find the following facts to be established by the testimony: In

1865, Carver Benbow, the father of the plaintiff, purchased the land in controversy, moved upon it with his family, and continuously occupied it as his homestead until May, 1887. At that time he started west, to visit his children, and for the benefit of his health, taking with him his ordinary wearing apparel, and leaving on the premises, and in his dwelling house, his household goods. These goods remained there until March 10, 1891, when they were disposed of at public sale at the request of the owner of them. He left his home for a temporary purpose, and with the intention of returning to it. We think the evidence abundantly establishes the fact that this land retained its homestead character, at least until the year 1890. In that year it appears that C. Benbow voted in the state of Washington. Prior to that time there was no evidence sufficient to show an abandonment of the homestead. He had been absent about three years. He had always expressed his intention of returning to his homestead. He had left all his house-

1. **HOMESTEAD:**  
**abandonment:**  
**evidence.**

hold goods in his dwelling house, and up to this time, at least, we think it clearly appears he had a fixed and abiding intention to return to his homestead. The fact of his going to a distant state, and remaining there for three years, and pursuing his occupation while there, can not be held to show an abandonment of his homestead, in view of his purpose in going, his leaving his household goods, and his often expressed intention to return. True, it is possible that the expression of his intention alone would not show that he had not abandoned the homestead, but when such expressed intentions are not in conflict with his acts, and are consistent with the accomplishment of his purpose in going away, and there is nothing to show any change in his intentions, they should be accorded weight in determining whether there was an abandonment of the homestead. The removal having been for a temporary purpose, with the intention of returning, it may well be presumed that such intent continued at least up to the spring of 1890, when C. Benbow voted in the state of Washington. Cases of abandonment depend upon the facts peculiar to each case, and, as no two cases are exactly alike, it is not profitable to enter into a discussion of the adjudicated cases. The following, among other cases, however, tend to support our holding: *Fyffe v. Beers*, 18 Iowa, 4; *Bradshaw v. Hurst*, 57 Iowa, 745; *Shirland v. Union Nat. Bank*, 65 Iowa, 96, 100; *Boot v. Brewster*, 75 Iowa, 631, 632; *Jones v. Blumenstein*, 77 Iowa, 361, 365. Prior, then, to the spring of 1890, there was no abandonment of the homestead.

II. The defendants' judgment was rendered in October, 1878. At that time, and for years afterwards,

C. Benbow was in the actual occupancy of the premises as a homestead. The premises remained impressed with the homestead character until at least 1890,

2. —: judg-  
ment: lien:  
duration: sale  
pending sus-  
pension of lien.

Under the statute, Code, section 2882, the judgment would cease to be a lien upon real estate in October, 1888. It follows that the judgment could only be made a lien upon the real estate by levy of an execution thereon, after the premises ceased to be a homestead, and while the title thereto remained in C. Benbow. The evidence satisfies us that the plaintiff purchased the premises early in March, 1891, and put his tenant in actual possession thereof. The said purchase was consummated prior to the time the defendants levied their execution on the land. It clearly appears that the land was purchased by the plaintiff at least two weeks prior to the defendants' levy, and possession was also taken prior to the levy. When the levy was made C. Benbow had no interest in the land, and hence the levy was ineffectual. It is immaterial that the deed from C. Benbow to the plaintiff was not acknowledged or recorded until after the date of the levy. The trade had been made, the consideration, in part, at least, paid, and the plaintiff was in possession. Under such circumstances, a purchaser is bound at his peril to take notice of the title and interest of the one in possession of the land. *Sears v. Munson*, 23 Iowa, 380, 390; *Eli v. Gridley*, 27 Iowa, 376, 377; *Harper v. Perry*, 28 Iowa, 57; *White v. Butt*, 32 Iowa, 335; *Phillips v. Blair*, 38 Iowa, 649.

III. The defendants' claim of fraud is not established. We are satisfied that the court below properly found that the defendants entered into a contract with the plaintiff to cancel their judgment for two hundred and ten dollars, and that the defendants entered into said arrangement, if not with full knowledge of all the facts, after taking ample time to fully acquaint themselves therewith, and that no fraud was practiced upon them by the plaintiff. In any view of the case, the plaintiff was entitled to a decree.

The judgment below must be AFFIRMED.

J. N. EDWARDS, Appellant, v. LOUISA COUNTY, Appellee.

1. **Contract: CONSTRUCTION OF LEVEE: ESTIMATES OF ENGINEER: RELIEF.** Under a contract for the construction of a levee, to be paid for at a price named per yard, upon estimates made by the county engineer, who was to be "the sole judge of the quality and quantity of all said work," the estimates made by the engineer are conclusive upon the parties in the absence of fraud, mistake, or some other wrong, which ought to entitle a party disputing such estimates to relief.
2. **Judgment: FORM OF ENTRY.** A dismissal of the plaintiff's petition after a trial on the merits, affords no ground for complaint where it appears that the plaintiff was not entitled to recover, and it was so adjudged.

*Appeal from Louisa District Court.*—HON. D. RYAN,  
Judge.

TUESDAY, OCTOBER 17, 1893.

ACTION at law to recover a balance claimed to be due to the plaintiff upon a contract entered into with the defendant to construct certain sections of a levee on Muscatine island. There was a trial by court upon the merits, and the plaintiff's petition was dismissed, and judgment rendered against him for costs, and he appeals.—*Affirmed.*

*L. A. Reiley and Caldwell & Molsberry*, for appellant.

*A. W. Jarvis*, County Attorney, and *Newman & Blake*, for appellee.

ROTHROCK, J.—I. The work done by the plaintiff in the construction of the levee was performed under a written contract. It is unnecessary to set out the contract at length. The part of it material to be considered in determining this appeal is, in substance, as fol-

1. **CONTRACT:**  
construction  
of levee: esti-  
mates of engi-  
neer: relief.

lows: The plaintiff was to receive for his work the sum of fifteen cents per cubic yard for all earth moved and placed in the embankment which constituted the levee. The payments were to be made in "county warrants issued or drawn on a special fund to be raised for that purpose by an assessment or levy on the land benefited by said levee." The work was to be done to the satisfaction and acceptance of the engineer of the levee, and the work was to be paid for on the estimates of said engineer, and the engineer was to be the sole judge of the quality and quantity of all said work, and from his decision there could be no appeal. The plaintiff was paid the full amount due him as shown by the estimates of the said engineer. This action was brought, not upon the ground of an alleged fraud or mistake of the engineer, but, so far as the original petition shows, the ground of recovery was that there was a balance due; and action was brought directly against the county, and judgment was demanded the same as if the claim were an ordinary money demand to be paid from the general revenue of the county, and not by warrants to be drawn by the county upon a special levy and assessment. It is the settled law of this state that where an action is brought upon a contract like this, it is incumbent on the plaintiff to plead and prove that the estimates made by the engineer in a contract like this are binding upon the parties, unless attacked upon the ground of fraud, mistake, or some wrong which ought to entitle the plaintiff to relief. *Mitchell v. Kavanagh*, 38 Iowa, 286; *Ross v. McArthur*, 85 Iowa, 203.

It will thus be seen that the petition of the plaintiff was grounded upon a mistaken conception of the plaintiff's rights under the contract; but, if the proper claim had been made in the petition, we think that the evidence introduced by the parties was such as to require the district court to find for the defendant. It

is claimed that a measurement of the work, which was made by an engineer at the instance of the plaintiff, showed by such an overwhelming weight of evidence that the original estimates were so wrong as to require the courts to render a judgment for the plaintiff. This engineer testified that the engineer whose duty it was to make the estimates admitted to him that he had made a mistake. It does not appear to be claimed that he stated how great a mistake it was. But, if it were shown that he admitted a material mistake had been made, it may well be questioned whether his admission was proper evidence. It was objected to by the defendant, and the admission does not appear to have been made while in the prosecution of the work. A full examination of the testimony of the engineer who measured the work for the plaintiff fails to show that he had the necessary facts from which to make an accurate survey and estimate of the work, and the court might well have found, as it no doubt did find, that the attack upon the original estimates was not sustained by sufficient evidence. We do not discuss the evidence in detail.

II. The plaintiff complains because the court dismissed the petition. The form of the order of the court was that "plaintiff's petition be dismissed, and that the defendant have and recover from the plaintiff its costs in this suit, taxed at thirty-five dollars and fifty-five cents." The form of the court's finding or order of judgment was wholly immaterial. It was a full trial on the merits, and it was adjudged that the plaintiff had no right to recover, and it was no prejudice to the plaintiff that his petition was dismissed.

The judgment of the district court is **AFFIRMED**.

89 542  
114 722

**CRESTON WATERWORKS COMPANY, Appellee, v. THOMAS  
McGRATH, Appellant.**

**Eminent Domain: CONSTRUCTION OF WATERWORKS: NECESSITY FOR TAKING PROPERTY.** Section 474 of the Code, granting power to cities to condemn so much private property as may be "necessary for the construction and operation" of waterworks, does not authorize the taking of private property on which to lay a railroad track for the purpose of conveying the materials used in the construction of said waterworks, and the coal used in their operation, from the railroad station in a town to a point a mile and three quarters distant, where the waterworks are to be constructed, at least where it appears that a public road, much used for travel, though somewhat hilly, and at times impassable on account of mud, leads from the railroad station to said waterworks. Neither can such power be exercised, however necessary, to enable a waterworks company to ship ice cut on its reservoir.

*Appeal from Creston Superior Court.*—HON. S. R.  
DAVIS, Judge.

WEDNESDAY, OCTOBER 18, 1893.

THE plaintiff is a corporation organized for the purpose of supplying water to the inhabitants of the city of Creston. It seeks by this proceeding to condemn a strip of land thirty feet wide through the defendant's farm, upon which it proposes to maintain a railroad track from the Chicago, Burlington & Quincy Railroad to its waterworks plant, which is situated about three quarters of a mile from the main line of the railroad. The works consist of a dam in a stream, a pumping house and appurtenances, and the pipes which convey the water from the works into the city. The defendant contends that the plaintiff has no lawful power to exercise the right of eminent domain by condemning any part of this land for a railroad track or switch. The superior court first determined the question

of the right to exercise the power, and held that such right existed. From that decision the defendant appeals.—*Reversed*.

*Thos. L. Maxwell and Haley & O'Donnell*, for appellant.

*D. A. Porter and Sullivan & Sullivan*, for appellee.

ROTHROCK, J.—I. The right by which the plaintiff claims that it has authority to condemn the land is founded upon certain provisions of the Code of this state. They are as follows: After providing that cities shall have power to erect waterworks, or to grant the right to do so to private individuals or incorporated companies, they are also authorized to construct, or authorize the construction of, such works without the city limits, “and for the purpose of maintaining and protecting the same from injury, and the water from pollution, their jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, trenches, pipes and drains used in and necessary for the construction, maintenance, and operation of the same, and over the stream or source from which the water is taken for five miles above the point from which it is taken; and to enact all ordinances and regulations necessary to carry the power herein conferred, into effect.” Code, section 472. Section 474 is in this language: “Said cities or towns are hereby authorized to condemn and appropriate so much private property as shall be necessary for the construction and operation of said waterworks; and when they shall authorize the construction and operation thereof by individuals or corporations, they may confer by ordinance upon such person or corporation, the said power to take and appropriate private property for said purpose.”

It will be observed that the power granted is to condemn so much private property “as shall be neces-

sary for the construction and operation of said waterworks." It is contended that a railroad track across the defendant's farm is necessary for the construction and operation of the works. The defendant insists that there is no such necessity, and the court below, after the introduction of evidence by both parties, determined that a railroad track was necessary.

It appears from the evidence that the railroad station at Creston is about one and three fourths miles from the reservoir, power house, pumps and other appliances by which water is forced through the pipes into the city, and that in building the works a large amount of material was used, which was received by railroad. There is a public road, which is much used for travel, which leads from the railroad station to the waterworks. This road is somewhat hilly, but it is one of the principal thoroughfares leading into the city. The plaintiff and its counsel appear to be of opinion that the word "construction," as used in the statute, has reference to the moving of the material necessary to erect the buildings. We think it means much more than that. Surely it was never intended that the power of eminent domain by which private property is taken for public use, not for the mere temporary purpose of the transportation of material for a building, but for all time, should apply to a case like this. But, suppose such a purpose was intended. The evidence shows that the construction of the waterworks was commenced in the month of April, 1891, and completed July 20, in the same year. The plant was completed before the issue was made up in this proceeding. The company did not await the action of the court to give it authority to lay the railroad track over the defendant's land. It was built in April, 1891, and used to ship the building material until the works were completed. So that now all the necessity there is for a railroad track is to ship coal for fuel to operate the works, and such

other supplies as may be necessary. There is no evidence authorizing a finding that any necessity exists to condemn land for that purpose. It would be a convenience to the plaintiff to do so, but it is not a question of convenience.

We can not accept the extravagant claims of some of the witnesses as to the necessity for this means of transporting fuel to the works. The manager of the plaintiff company testified that at the time of the trial the works consumed about two and one half wagon loads a day. It is true he testified that they were not then running with full force; but, making a liberal allowance for that condition, we think it would be absolutely in the face of the facts to hold that there is any such necessity as the law requires to confer the power to condemn the defendant's land. The claim made that the road is at times impassable by reason of mud, so that coal can not be hauled, is no reason for holding that the railroad track is a necessity. We see no reason why the plaintiff can not take advantage of the weather and good roads, the same as others, to provide against the contingency named. There is no evidence of a necessity for condemning this land for the purpose of the waterworks. It is true that it appears in evidence that the plaintiff cuts large quantities of ice on its reservoir, and ships it over this spur track. One of the witnesses testified that as many as eighty cars were loaded and shipped in a day. Much of this ice was shipped to points other than the city of Creston. It is scarcely necessary to say, that the statute above cited gives no authority to condemn land for the purpose of laying railroad tracks for the benefit of persons engaged in the ice business.

It is not necessary to cite authority in support of the conclusions which we have reached in this case. The question as to when the right of eminent domain may be exercised, that is, when there is a public necessity

to exercise the right, is a question for the legislature, within proper restrictions. It is not for this court to determine in this case that the legislature might in its wisdom authorize the condemnation of private property upon which to construct a railroad track to waterworks. No such question is in the case. It is a question, however, whether private property may be condemned for a railroad track because it is a necessity for the operation of the waterworks. We hold that under the evidence no such necessity is shown to exist. It is everywhere held that statutes delegating the right of eminent domain are in derogation of common rights, and are not to be extended by implication, but are to be strictly construed. See an exhaustive article on this subject in 6 American and English Encyclopedia of Law, 509.

II. After it was determined that the plaintiff had the right to condemn the land, a jury was impaneled, and a trial was had, in which it was found that the defendant was entitled to damages for the right of way in the sum of eight hundred and fifty dollars. The plaintiff appealed from the assessment of damages. It is unnecessary to consider his appeal, as we hold that there was no right to condemn his land.

The judgment of the superior court is **REVERSED**.

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**BERTHOLD & JENNINGS, Appellees, v. SEEVERS MANUFACTURING COMPANY *et al.*, Appellants.**

1. **Sale: DELIVERY OF GOODS OF INFERIOR QUALITY: ACCEPTANCE BY VENDEE: DAMAGES.** Where upon a sale of lumber, the kind delivered to the vendee was of an inferior quality and of different dimension from that agreed to be furnished, but the same was accepted by the vendee with knowledge of the defects, and without complaint until about four months after delivery, and after a part of the price had been paid, *held*, that the vendee was not entitled to recover the actual damages sustained by reason of the difference in the kind and quality of the lumber furnished.

89	508
120	509
89	500
139	289

2. ———: ———: WARRANTY. The quality and dimension of the lumber to be furnished being specified in the contract, *held*, that there was no implied warranty that the lumber furnished should be fit for the purpose for which it was intended.

*Appeal from Mahaska District Court.*—HON. A. R. DEWEY, Judge.

WEDNESDAY, OCTOBER 18, 1893.

THIS action is to recover the agreed price of a lot of piling sold and delivered by plaintiff to the defendant under a contract to deliver piling of certain specified dimensions and quality. The defendant answered, admitting the purchase, and that the plaintiff delivered "piling of the general nature and kind specified," and alleging, by way of counterclaim, that the piling delivered was not of the dimensions or quality agreed to be furnished, in that it was crooked, knotty, smaller, and of less diameter and length, by reason whereof he was damaged in certain particulars set out. The plaintiff replied, denying every allegation in said counterclaim.

Upon these issues the case was tried to the court, and the court found as follows; "As a matter of fact, that under the evidence the defendant sustained substantial damages upon his counterclaim upon the items of piling furnished by the plaintiff under their contract, as set out in his answer and amendment thereto filed in this cause. But the court found, as a matter of law, that notwithstanding such claim, and the proof made thereon to the satisfaction of the court, that the defendant is not entitled to recover the same in this action, or to have the same set off against the claim of the plaintiff, but that the plaintiff, notwithstanding the proof of such counterclaim, is entitled to the full amount of his demand sued for. \* \* \* And upon such finding of the facts and conclusions of law, as aforesaid, the court entered a judgment in favor of the plaintiffs for the full amount of the plaintiffs' claim,

with interest thereon, amounting in all to the sum of two hundred and five dollars and ninety-one cents, against the defendants, to which they at the time duly excepted." The defendant appeals, assigning as error the holding of the court as to the law, and the refusal to allow the damages found to have been sustained by defendant.—*Affirmed*.

*Seevers & Seevers*, for appellant.

*John O. Malcolm*, for appellees.

GIVEN, J.—I. The record shows that the defects in the piling complained of were open, and readily discoverable; also, that the appellant kept and used the piling, knowing of these defects, without notice or complaint to the plaintiff until some four months after, and after a part of the price had been paid. The finding of the court shows that the piling furnished was inferior in dimensions and quality to that agreed to be furnished, and that the defendant sustained substantial damages by reason thereof. The single question submitted on this appeal is whether, under these facts, the defendant is, in law, entitled to recover said damages. The appellant contends that, under the rulings of this court, he is entitled to recover said damages, and cites *Davis v. Fish*, 1 G. Greene, 406, 407; *Crookshank v. Mallory*, 2 G. Greene, 257, 258; and *Pixler v. Nichols*, 8 Iowa, 106. The appellee's contention is that, the appellant having received and retained the piling, with knowledge of the defects, without notice or complaint to the plaintiff within a reasonable time, he must be held to have waived his claim for damages.

In *Davis v. Fish*, *supra*, there was no claim that the defects in the flatboats, the subject of the controversy, were open and visible, nor was a waiver

1. SALE: delivery of goods of inferior quality: acceptance by vendee: damages.

pleaded. *Crookshank v. Mallory, supra*, was for the erection of a building upon real estate belonging to the defendant. The building, though incomplete, became a part of the defendant's real estate, and could not be rejected or returned. Hence, the defendant was entitled to damages, notwithstanding he had taken possession of the building. The same rule was applied in *McClay v. Hedge*, 18 Iowa, 66, under a contract to build a barn. For the same reason, it was held in *Pixler v. Nichols, supra*, that a party who had contracted to labor for a specified time, and who quit before the time, could recover the actual value of the work done, less damages for a breach of the contract. The reason for the rule in these cases is that what had been received could not be returned. We have seen that the appellant retained and used this piling, knowing of its defects, without notice or complaint within a reasonable time, and without offering to return them, as could have been done. It is clear that the rule in the cases cited does not apply to this case, and it is upon those cases that the appellant relies in his opening argument.

II. In reply to the appellees' argument, the appellant cites the familiar rule as to implied warranties, and contends that the law implies a warranty that the piling was suitable for its intended use; that there being such a warranty, and the piling not being suitable, damages may be recovered without returning the piling. As this claim was not made in the opening argument, and the appellee has not replied to it, it may be questioned whether the appellant is entitled to have it considered; but, as no objection has been made, we inquire whether, under the law, the appellant is entitled to recover as upon an implied warranty.

The appellant states the rule as follows: "*Fourthly*, when a manufacturer or dealer contracts to supply an

article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. *Fifthly*, where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article." The appellant did not trust to the judgment or skill of the appellee as to the quality and dimensions of the piling to be furnished. Their quality and dimensions were fixed by the contract. Had the appellant ordered piling suitable for the construction of a particular bridge, or a bridge of specified dimensions, leaving the appellee to determine what would be suitable, the rule cited would apply. In this case the quality and dimensions of the piling are not left to implication, but are fixed by the contract. "When goods are delivered on an existing contract, requiring a particular quality, the absence or presence of which can be seen on mere view, in such cases the purchase is without warranty, or the acceptance without objection, leaves the seller relieved of all responsibility for the goodness, quality, or fitness of the property." 2 Sutherland on Damages, 1489. See, also, *Allison v. Vaughan*, 40 Iowa, 421, 424; *Hirshhorn v. Stewart*, 49 Iowa, 418; *Wineland v. Jones*, 77 Iowa, 401.

Our conclusion is that, under the law and the facts, the appellant is not entitled to recover on the

GUSTAVE MOY, Appellant, v. RUDOLPH MOY, Appellee.

**Title to Real Estate:** PURCHASE OF OUTSTANDING TITLE BY TENANT IN COMMON: EFFECT. Where, upon the foreclosure of a mortgage against property held in common, the property is bid in at the foreclosure sale by one of the cotenants, he can not, upon acquiring a sheriff's deed under such sale, claim absolute title to said property to the exclusion of his cotenants, but will have his interest therein increased merely to the extent of the amount necessary for the cotenant to redeem his undivided share.

*Appeal from Woodbury District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, OCTOBER 18, 1893.

ACTION to quiet title in the plaintiff to lot 9, block 41, Middle Sioux City, Woodbury county, Iowa. A decree was entered dismissing the plaintiff's petition, from which he appeals.—*Affirmed.*

*Kennedy & Kennedy*, for appellant.

*Argo & McDuffie*, for appellee.

GIVEN, J.—In an action for the partition of said lot, wherein this plaintiff was defendant and this defendant was plaintiff, a decree was entered finding that this plaintiff owned the undivided eight fifteenths, and this defendant the undivided seven-fifteenths. It was also found and decreed as follows: "The court further finds that the plaintiff ought to pay to the defendant, Gustave Moy, by reason of a certificate of sale held by him, and executed to him by the sheriff of Woodbury county, Iowa, upon the sale of

89	511
102	158

89	511
111	163

89	511
137	250

Five Cents Savings Bank, seven fifteenths of the amount required to redeem said premises from said sale, as shown by said certificate. It is, therefore, considered, adjudged and decreed by the court that the said shares of the said parties, and their interests, respectively, in said lands, be, and the same are hereby confirmed; that the plaintiff herein pay to the defendant, Gustave Moy, seven fifteenths of the amount required to redeem said premises from said sale, as shown from said sheriff's certificate, and that such payment, when made, shall operate as a release and satisfaction of the lien created by said mortgage and proceedings thereunder, to foreclose the same upon said interest and share of the plaintiff in said real estate." Referees were appointed to sell the property. It is conceded that the appellant did not, and never intended to, take an appeal from that decree.

The certificate held by the appellant was upon a foreclosure sale under an outstanding mortgage, subject to which both these parties had their respective titles. No redemption having been made from that sale, the appellant received a sheriff's deed, and it is by virtue of that deed that he asks to be quieted in the title as against the appellee. There are very conclusive reasons why he is not entitled to such relief. They were tenants in common, and, as said in *Austin v. Barrett*, 44 Iowa, 488: "It is well settled that one tenant in common can not purchase an outstanding incumbrance, and, after it matures into a title, set it up against his cotenant." See, also, *Sears v. Sellew*, 28 Iowa, 501; *Weare v. VanMeter*, 42 Iowa, 128, and *Fallon v. Chidester*, 46 Iowa, 588. The decree in the former case determined the extent of the interests of the parties in said lot. It found that the appellant, in addition to his eight fifteenths, was entitled to seven fifteenths of the amount required to redeem from the foreclosure. It was not decreed that the appellee should

redeem from that sale, but that the appellant had that additional interest in the lot, and consequently in the proceeds of the sale that the referees must make. The plaintiff's petition was properly dismissed. The judgment is therefore **AFFIRMED**.

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HERBERT POWELL, Appellee, v. JAMES CHITTICK,  
Appellant.

89	513
127	698
89	513
134	256

1. **Sales: WARRANTY: DECLARATIONS OF VENDOR.** An affirmation by a vendor preceding a sale of hogs at public auction, to persons assembled for the purpose of bidding at such sale, that the hogs to be sold were "all right," the representation being made to effect a sale of the hogs, is a warranty that the hogs were not at the time infected with "hog cholera, swine plague, or other infectious disease," and a purchaser, at such sale, relying upon such representation, would be entitled to recover damages, for a breach of such warranty, although he had expressed himself prior to the sale, after looking at the hogs, that "he had made up his mind to buy some of the hogs, if they went cheap enough."
2. ———: ———: **TESTIMONY OF EXPERTS: INSTRUCTION TO JURY.** There having been introduced the testimony of two veterinary surgeons, as experts, one of whom had had sixteen years of practice, and the other less than one, *held*, that a general instruction to the jury that, this kind of evidence is competent and should be given such weight as in their judgment it was entitled to receive, was not objectionable as taking from the jury the right to determine the weight to be given such evidence.
3. **New Trial: GROUNDS: MISCONDUCT OF COUNSEL IN ARGUMENT TO JURY.** Where counsel, in the course of his argument to the jury, read to it certain interrogatories which were to be submitted to it for its special findings, informed it that its special and general verdicts should be consistent, and told it what its findings should be to support a verdict for his client, *held*, that such conduct was not objectionable, and was not, therefore, ground for a new trial.
4. **Special Verdict: FORM OF INTERROGATORIES.** A party is not entitled to have submitted to a jury for its special findings, any interrogatory having relation to facts which are not in dispute, or which embraces two or more questions, to which different answers might be returned.

*Appeal from Adair District Court.*—HON. J. H. HENDERSON, Judge.

WEDNESDAY, OCTOBER 18, 1893.

THE plaintiff and defendant are farmers in Adair county, Iowa. In July, 1890, the defendant went to Nebraska, and while there he purchased and shipped to his farm in Adair county three car loads of hogs for the purpose of feeding them. Thereafter, because of a change of purpose on the part of his sons, in consequence of which they were not to remain on the defendant's farm, he concluded to sell the hogs at public auction, and the eleventh day of September following was fixed upon for that purpose, and notice given thereof. The plaintiff was present at the sale and purchased twenty-three of the hogs. He took them home and placed them in a pen adjoining another pen in which were twenty-three other hogs. Within a short time fifteen of the hogs purchased of the defendant and part of the others died of disease, and the plaintiff brings this action to recover the damage, averring that the defendant warranted the hogs to be sound and all right, and further averring, in a second count, that the representations as to the quality of the hogs were fraudulent. The answer puts in issue the averments as to the warranty and the fraud. There was a verdict and judgment for the plaintiff, from which the defendant appeals.—*Affirmed.*

*Sayles & Hinkson*, for appellant.

*Sever & Neal*, for appellee.

GRANGER, J.—With the general verdict the jury returned the following special findings:

“*First.* Did the defendant, just before the sale of the hogs, represent that the hogs were all right?

1. SALES: WARRANTY: declarations of vendor.

Answer. Yes. *Second.* Was there a warranty, as in these instructions defined, that the hogs were all right? A. Yes.

*Third.* Were the hogs, at the time of the sale, diseased with swine plague, hog cholera, or infested with other infectious disease? A. Yes. *Fourth.* Did the defendant, at the time of the sale, know that the hogs were so diseased? A. Yes.

It will be seen that the jury found that there was a warranty and also fraudulent representations, which gives to the general verdict the support of a finding for the plaintiff on both counts of his petition. The two counts of the petition being based on the same cause of action, but one recovery can be had, and the jury was so instructed; hence, if the record is without reversible error as to either cause of action, the verdict has such support as avoids a reversal.

We first notice the case upon the issue as to a warranty in the sale of the hogs. It is not to be seriously questioned that the hogs, when sold, were infected with "hog cholera, swine plague, or other infectious disease;" and this is the particular fact constituting the breach of the alleged warranty. A controversy arises over the fact of the warranty; that is, whether the plaintiff represented the hogs to be all right, and, if he did so, was the representation so made as to constitute a warranty? The court, in its instructions, said to the jury:

"*Seventh.* To constitute a warranty, no particular words or expressions are necessary, nor need the words 'warrant' or 'warranty' be used. Any distinct representation or affirmation of the condition or quality of the article or thing sold, made by the seller at the time of the negotiations for the sale, which he intended, and from which the purchaser at the time had reasonable grounds to suppose and believe were intended by him, to effectuate the sale, that the purchaser, in fact, did

so believe in making the purchase, relied thereon, and on the truth thereof, and which were operative in effecting the sale, is a warranty. It is not necessary to show that the seller at the time intended to cheat or deceive the purchaser in the sale, nor is the plaintiff required to show that the seller at that time knew the representations to be false; but he has the right to rely upon the representations or affirmations so made. The mere praise of the property sold, or a bare affirmation of its soundness, at the time when it was exposed for the purpose of inspection, does not, of itself, constitute a warranty; or if the purchaser had determined to purchase without such representations or affirmations, and formed his own opinion, and relied upon his own judgment, and did not rely upon the representations or affirmations, if any were made, then there is no warranty. In this case, if you find from the evidence that the defendant, at the time of and just before the beginning of the sale of the hogs, made the statements, to the persons there assembled for the purpose of bidding on the hogs then to be sold, that the hogs were all right, which he intended, and from which plaintiff had reasonable grounds to suppose and believe that the defendant intended, thereby to effectuate a sale of the hogs, and did in fact so suppose and believe, relied thereon, and upon the truth thereof, and that such representations were operative in making the sale; that in fact said hogs were not all right, but were diseased with swine plague, hog cholera, or other infectious disease, then the plaintiff will be entitled to recover upon the first count of his petition. If you fail to so find, you must find for the defendant thereon."

The jury, under this instruction, specially found that there was a warranty, and the finding has ample support in the testimony. Not that the evidence is not conflicting, but it is of a character to sustain the

finding, and it is not important that we should discuss it at length.

Considerable importance is attached to the undisputed fact that the plaintiff was present, looking at the hogs, for some time before the sale commenced, and he said in his testimony that "he had made up his mind to buy some of the hogs, if they went cheap enough." Such a statement in evidence should not be taken as conclusive that his purchase was to be without conditions as to the health or soundness of the hogs, and it is both improbable and incredible that he would have even contemplated a purchase had he known or had a suspicion of their true condition.

It is urged that the words used were only those of commendation, and not such as would constitute a warranty. The rule as to an implied warranty is correctly stated in the instruction given, and, while such words might not at all times amount to a warranty, yet, when used for the purpose of having them relied upon in making the purchase, and they are so relied upon, and are as to facts on which the buyer has a right to rely, they amount to a warranty, and the question is usually one of fact. We may well apply the rule quoted by the appellant from Bennett's *Benjamin on Sales*, section 613: "It is rightly held by *HOLT, C. J.*, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appears in evidence to have been so intended. In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter upon which the vendor has no special knowledge, and on which the buyer also may be expected to have an opinion, and to exercise his judgment. In the former case it is a warranty; in the latter it is not." There is not a requirement of the rule for a warranty that could not have been found in

this case under the evidence. That the plaintiff, when he made the purchase, was ignorant of the facts as to the disease of the hogs is not to be doubted, and the defendant certainly "assumed to assert a fact" of which the plaintiff was ignorant. There is testimony tending to show that the hogs were "off feed," or affected by overfeeding or change of climate, and that this condition was observable from inspection, and, when admitted, it is but a fact strengthening the claim in behalf of a warranty. The defendant had an opportunity better than the buyers to know the true situation, and the buyers had a right to rely upon his special knowledge; and, as to the cause of the apparent condition, the buyers would not be expected to have an opinion. It is likely true that the remark that the hogs were all right was made to remove any apprehension as to their apparent condition. Under such circumstances, a purchase would most likely be made with reliance upon such a statement, and such a statement, made under such circumstances, would be designed to induce a purchase upon its reliance. Clearly the case is within the rule cited.

II. The court gave a general instruction to aid the jury to know the value of, or weight to be given to,

2. —: —: testimony of experts: instruction to jury.

certain expert evidence by veterinary surgeons, where their opinions were based on facts drawn from other evidence, and not from their personal observation. There were two such witnesses, one of whom had sixteen years of practice and the other less than one, and the complaint is that the instruction practically told the jury that the testimony of the one of extended experience was "weak and inconclusive," compared with that of the other. The instruction does not even indirectly refer to their evidence by way of a comparison or otherwise, but in a general way treats of such evidence. The instruction is not open to the criticism that it takes

from the jury the right to determine the weight to be given to such evidence. It is said to the jury: "This kind of evidence is competent, and should be given such weight as in your judgment it is entitled to receive."

III. Complaint is made of the conduct of the plaintiff's attorney in the closing argument, in that he read to the jury the questions on which the findings were to be made, and the record indicates that he used language to the effect that its special and general verdicts should be consistent, and what the findings should be to support a general verdict for the plaintiff. The contention by the appellant is that "he had the right to have the questions answered without the knowledge of the jury as to the effect such answers might have upon their general verdict." It seems to us that the contention can not be sustained upon reason. If a party has such a right, under the law, then it must follow that a properly constituted jury will be ignorant of the law governing special and general verdicts. A moment's reflection upon the theory of jury trials will indicate the fallacy of the claim. Juries are, and should be, instructed that their general verdicts should be based upon controlling facts found by them; and the rule obtains whether the facts found are reported in the nature of special findings, or merely serve the jury in its mental process of reaching its conclusions. Such a rule and practice is only consistent with the fact of knowledge on the part of the jury that the general verdict rests upon, and must be consistent with, its conclusion upon particular facts. Special findings should only be of facts important to a general conclusion or verdict, and they are to be found by the jury whether specially returned or not. If the appellant's contention is to be sustained, the logical conclusion could not be escaped that, for the court to instruct a

2. New trial:  
grounds: mis-  
conduct of  
counsel in ar-  
gument to  
jury.

jury that if certain facts were found, they would necessitate a particular general verdict in harmony with them, would be error, for it would inform the jury how to maintain consistency in its findings and general conclusions. It seems to us that the rule contended for would encourage an uncertain or gambling system of jurisprudence, to the detriment of that which is reasonable and fair. We see no error in permitting the questions to be read or stated to the jury, and the law and the evidence pertinent thereto discussed, to the end that the jury may have correct information. The case of *Timins v. Rock Island & Pacific R'y Co.*, 72 Iowa, 94, is authority for our conclusion, although upon somewhat different facts.

IV. The defendant asks that certain questions be submitted to the jury, which were refused, and this action by the court is assigned as error.

4. SPECIAL VERDICT: form of interrogatories.

Those submitted by the court on a former motion, in the main particulars, embraced the substance of part of those asked, and, as to the others, they were as to facts not in dispute, or improperly presented, as that two or more questions were embraced in one, where, upon separate questions, different answers might have been returned. We quote the second question asked, as stress is placed upon the action of the court in that particular:

"*Second.* Do you find from the evidence in this case that the plaintiff, Herbert Paul, before any statements were made by James Chittick or the auctioneer, inspected said hogs, and decided to buy some of said hogs, if the price was satisfactory, and did he buy said hogs in pursuance of such decision?"

The condition of the record is such that the last question could be well answered in the negative, while those preceding could well be answered in the affirmative, and such a question would tend rather to confuse than aid the correct solution of a case. We think there was no error in the refusal.

Upon the question of the warranty, we think the case was fairly submitted, and the verdict has full support in the evidence. The judgment is unquestionably a just one. We need not consider the questions presented as to the fraud in the sale, for, whatever might be the conclusion, the judgment must stand. The measure of damage, under the facts, is the same in either case, and the court so instructed. The only question to be aided by a consideration of the question of fraud would be that as to costs, for which purpose we have examined the record, and think that in all respects the judgment should be AFFIRMED.

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LINZA ELLIS, Appellant, v. EDWARD CARPENTER *et al.*,  
Appellees.

1. **Highways: ESTABLISHMENT: APPEAL FROM DECISION OF BOARD OF SUPERVISORS: NOTICE: SUBSTITUTED SERVICE.** Under section 959 of the Code, providing that, in appeals to the district court from the decision of the board of supervisors establishing a highway, "notice shall be served on the four persons first named in the petition for the highway," personal service is required; and where notice of appeal was personally served upon three of such persons, and the fourth not being found, a copy of the notice was left at his usual place of residence with a member of his family over fourteen years of age, *held*, that the appeal was properly dismissed, although the person so served learned of the notice, and appeared in court for the purpose of objecting to the sufficiency of the service.
2. ———: ———: ———: **RIGHT TO WITHDRAW APPEAL.** The plaintiff's appeal having been dismissed, *held*, that the defendants, who had also appealed from the decision of the board, were properly permitted to withdraw their appeal.

*Appeal from Mahaska District Court.*—HON. J. K.  
JOHNSON, Judge.

WEDNESDAY, OCTOBER 18, 1893.

THIS is a proceeding to establish a public highway. The petition praying the establishment of the highway was signed by some forty-three persons, and was filed

with the auditor of the county. The proposed highway ran along the line of the plaintiff's farm, and occupied some forty feet in width thereof. He filed a claim for damages. Commissioners were appointed, and his damages were assessed at one hundred and sixty dollars. The matter was heard by the board of supervisors, and the road was ordered established upon condition that the petitioners pay the damages. The plaintiff attempted to appeal from the award of damages, and the petitioners for the road also appealed. The plaintiff's appeal was dismissed, and afterwards the appeal of the petitioners was, on their motion, dismissed. The plaintiff appeals to this court.—*Affirmed.*

*Bolton & McCoy*, for appellant.

*Haskell & Greer* and *John F. & W. R. Lacey*, for appellees.

ROTHROCK, J.—I. The appeal of the plaintiff was dismissed for the reason that no proper notice of the appeal was served, and that, because of the failure to make proper service, the district court had no jurisdiction of the case. The notice and service thereof in such cases is prescribed by section 959 of the Code, which is as follows:

1. HIGHWAYS:  
establishment:  
appeal from  
decision of  
board of su-  
pervisors: no-  
tice: substi-  
tuted service.

“Any applicant for damages claimed to be caused by the establishment of any highway, may appeal from the final decision of the board of supervisors to the circuit (district) court of the county in which the land lies; but notice of such appeal must be served on the county auditor within twenty days after the decision is made. If the highway has been established on condition that the petitioner therefor pay the damages, such notice shall be served on the four persons first named in the petition for the highway, if there are that many who reside in the county.”

The four persons first named in the petition were Edward Carpenter, J. A. Baitsell, C. D. Randall, and Daniel Monk. The service of the notice of appeal, as shown by the return of the sheriff, was as follows:

"I hereby certify and return that this notice came into my hands September 22, 1891, and on September 24, 1891, I served the same personally on J. A. Baitsell, Ed. Carpenter, and Daniel Monk, by reading the same to them, and delivering to them a true copy thereof. Said defendant C. D. Randall not being found, I served the same by leaving a copy hereof with Sarah Randall, a member of his family over fourteen years of age, at his last and usual place of residence, in Mahaska county, Iowa, September 24, 1891."

It will be observed that the service on C. D. Randall was not made upon him personally but by leaving a copy with his wife. The court below was of the opinion that said service was not sufficient. The statute does not authorize service in that manner. When service is required, it means personal service. There is no authority for adopting the substituted service provided for in the service of an original notice in that action.

It is true that Randall learned of the fact very shortly after the notice was left with his wife, and he appeared in the district court, and joined with the other petitioners in a motion that the appeal be dismissed because there was no proper service of the notice of the appeal on him. An appearance for the purpose of objecting to the jurisdiction of the court because the notice of the appeal was not served within the time required by statute did not confer jurisdiction. *Spurrier v. Wirtner*, 48 Iowa, 486, 487. In *Brydolf v. Wolf*, 32 Iowa, 509, it was held that a service of an original notice on the wife of one of the partners of the firm is not sufficient as a service on the firm. The same rule should apply in a case like this. The first four persons

who signed the petition are representatives of all the others, and of the public. It is necessary to serve them with notice of the appeal in order to confer jurisdiction on the district court. Suppose that the notice had been served on the wife of the auditor. No one would claim that the court had jurisdiction by such service. The record, as made up, must show jurisdiction, and it appears to us that it is just as essential that the four persons who first signed the petition be personally served as that the auditor be so served. The jurisdiction should appear upon the face of the record, and not be left to an investigation to determine whether the persons to be served received a notice by being left with some third person, or by being sent by mail or otherwise.

There is nothing in the views above expressed inconsistent with the opinion in the case of *Brown v. Petrie*, 86 Iowa, 581. That was a proceeding before the township trustees to apportion the parts of a division fence that the plaintiff and the defendant should build and maintain. The service of the notice of the proceeding was made on the defendant's wife. The award of the board was made, and the defendant complied, mainly, therewith, and built nearly all of the part of the fence assigned to him; and, when an action was brought to recover for the small part not built by the defendant, it was held that, as there was no direct attack on the award, the defendant would not be permitted to question it, without showing that he had no knowledge of the proceeding. It will be observed that the notice required in that case was in the nature of a notice in an original action, or rather in a special proceeding. In the case at bar, as we have said, the record should show on its face that an appeal was taken.

II. Complaint is made because the petitioners for the highway were permitted to withdraw their appeal.

- They had the undoubted right to do so.
2. right to with-  
draw appeal. We know of no case in which the appellant has not the right to abandon his appeal taken from an inferior court to a court having appellate jurisdiction. The judgment of the district court is **AFFIRMED**.

**MCCORMICK HARVESTING MACHINE COMPANY, Appellant, v. MALTEN RICHARDSON, Appellee.**

1. **Sales: ORDERS: ACCEPTANCE NECESSARY TO COMPLETE CONTRACT.** An order or request in writing, addressed to a dealer or his agent, to ship to the writer, on or about a date named, goods of a kind specified, for which the writer agrees to pay a price named, does not constitute a contract until accepted or acted upon by the vendor, and may be withdrawn at any time before acceptance. Hence, where such an order directed that the goods specified be shipped three months after the date of the order, and the vendor gave no indication of the acceptance of the order until the date named, when he shipped the goods, *held*, that the vendee was not then bound to receive them.
2. **—: —: —: EVIDENCE OF CONTEMPORANEOUS PAROL AGREEMENT.** Evidence that at the time such an order was delivered to an agent of the vendor it was orally agreed that the order should be sent to his principal for approval and acceptance, is not incompetent as tending to contradict a written contract.
3. **—: —: —: PLEADING: AMENDMENTS.** The acceptance of the above order being alleged in the petition, and denied in the answer, *held*, that the plaintiff was not prejudiced by the filing of an amendment to the defendant's answer at the close of the testimony alleging a parol agreement with the agent at the time of the delivery of the order that the same should be forwarded to the plaintiff for its approval and acceptance.
4. **Practice in Supreme Court: QUESTIONS CONSIDERED ON APPEAL:** Questions which do not arise under the issues in a cause, and which are raised for the first time on appeal, will not be considered by the supreme court.

*Appeal from Kossuth District Court.*—HON. GEORGE H. CARR, Judge.

WEDNESDAY, OCTOBER 18, 1893.

89	525
90	247
89	525
94	121
89	525
103	476
89	525
122	411
89	525
127	240
89	525
d130	122
89	525
f134	255

ACTION on a written order for binding twine. From a verdict and judgment for the defendant, the plaintiff appeals.—*Affirmed*.

*Soper, Allen & Morling*, for appellant.

*Danson Bros. and Parker & Richardson*, for appellee.

KINNE, J.—The petition alleges that on January 31, 1891, the defendant entered into the following written order:

“January 31, 1891.

*Mr. W. S. Krebs, Albert Lea, Minn.:*

Please ship McCormick binder twine as follows:

167 bales Standard mixed, 5 lb. balls, 60 lbs each.....	10,020 lbs.
50 bales Pure Sisal, 5 lb. balls, 60 lbs each .....	3,000 lbs.
117 bales New Zealand, $\frac{1}{2}$ and $\frac{1}{4}$ , 5 lb. balls, 60 lbs each.....	7,020 lbs.
	<hr/> 20,040 lbs.

to M. Richardson, Algona, Iowa, on or about May 1, by C. & N. W. R’y, for which I agree to pay, f. o. b. cars in Chicago, as follows: Standard Mixed, ten and one half cents per pound; Pure Sisal, nine cents per pound; New Zealand, nine and a quarter cents per pound: net cash on or before October 1, one half, and November 1, balance, next.

“[Signed] M. RICHARDSON.”

That Krebs, to whom the order was addressed, was the general agent of the plaintiff, having charge of its business at Algona, Iowa; and that the defendant knew he was ordering said twine of the plaintiff through said general agent. That Krebs gave the order to the plaintiffs, who accepted the same, purchased twine to fill the same, and on May 1, 1891, thereafter, shipped said twine to the defendant in pursuance of said order. That after the arrival of said goods at Algona, and about June 1, 1891, the defendant refused to receive

the goods, whereupon the plaintiff caused the same to be sold to the highest bidder, after due notice, and applied the proceeds of such sale, less the expense of selling and the freight, upon the contract price of the goods. That the amount so applied was one thousand, five hundred and fifty-five dollars, and sixty-five cents, leaving a balance due the plaintiff of five hundred and seventeen dollars and twelve cents, for which judgment is prayed.

The defendant answered, admitting that he signed the order, that the contract price was as is stated in the order, and that the plaintiff sold the goods after they arrived at Algona; denies all other allegations in the petition. The defenses set up in the second and third divisions of the answer were not submitted to the jury, as no evidence had been offered to sustain them. The fourth division of the answer is a general denial. In an amendment to the answer the defendant admits the signing and delivery of the order, and avers that at said time it was orally agreed between the defendant and the plaintiff's agent, Strouse, who took the order, that it should be sent to the plaintiff, or its general agent, Krebs, at Albert Lea, Minnesota, for approval and acceptance of the plaintiff, and the same was so sent. That the plaintiff received the order about February 2, 1891, and prior to June 1, 1891, did not inform or notify the defendant that said order was accepted, or that the goods would be shipped, and the defendant had no knowledge that the goods would be shipped or order accepted until he received notice that they were shipped, which was about June 1, 1891. That said order was not accepted within a reasonable time after same was received by the plaintiff, and there was no contract between the plaintiff and defendant by reason thereof.

I. The plaintiff contends that the writing heretofore set out, was a contract of sale, and binding upon

1. **SALES:** orders: both parties from the date of its execution.  
 acceptance  
 necessary to  
 complete con-  
 tract. The defendant insists that the writing was  
 a mere request, proposal, or order, which  
 was not binding until accepted or acted upon by the  
 plaintiff, and that it might be recalled, rescinded, or  
 revoked at any time prior to its acceptance. The court  
 construed the writing as contended for by the defend-  
 ant. The correctness of the court's action is raised by  
 objections to testimony; also by exceptions to certain  
 instructions given, and to the refusal of the court to  
 give instructions asked by the plaintiff.

The material question in the case is as to the  
 proper construction of the writing. It is said in *Good-  
 paster v. Porter*, 11 Iowa, 161-163: - "A contract  
 includes a concurrence of intention in two parties, one  
 of whom promises something to the other, who, on his  
 part, accepts such promise; hence, consent or accept-  
 ance is indispensable to the validity of every contract."  
 "Mutual consent is requisite to the creation of a con-  
 tract, and it becomes binding when a proposition is  
 made on one side and accepted on the other." 2  
 Kent's Commentaries, 477; 1 Parsons on Contracts,  
 475. "A mere offer, not assented to, constitutes no  
 contract, for there must be not only a proposal, but an  
 acceptance thereof. So long as a proposal is not  
 acceded to, it is binding upon neither party, and  
 may be retracted." 1 Story on Contracts, section 490.  
 "Where there is a written offer to sell, an acceptance  
 constitutes the agreement, if the offer is still standing;  
 and it is presumed to be so until the time fixed, or, if  
 none were appointed, till it is expressly revoked or  
 countervailed by a contrary presumption. \* \* \* A  
 bargain is closed where nothing mutual remains to be  
 done to give either party the right to have it effected.  
 Until both parties are agreed, either may withdraw an  
 offer which he has made." Hilliard on Sales, section  
 20. "A proposal or offer, therefore, must in some

way be accepted to constitute a sale." Benjamin on Sales, [Bennett's Ed. 1892, American Notes] p. 73. It has been held that such a writing does not constitute a contract until accepted or acted upon, and that, prior thereto, it may be withdrawn. *Johnson v. Filkington*, 39 Wis. 65; *Church v. Sherman*, 36 Wis. 404; *National Refining Co. v. Miller*, 47 N. W. Rep. (S. D.) 962; *Morris v. Brightman*, 9 N. E. Rep. (Mass) 512; *Stensgaard v. Smith*, 44 N. W. Rep. (Minn.) 669. See, also, *Greve v. Gauger*, 36 Wis. 369; *Western Historical Co. v. Schmidt*, 14 N. W. Rep. (Wis.) 822; *Graff v. Buchanan*, 48 N. W. Rep. (Minn.) 915; *Thomas v. Greenwood*, 37 N. W. Rep. (Mich.) 196; *Etheredge v. Barclay*, 6 S. Rep. (Fla.) 861.

In the light of these elementary principles and of the cases cited it seems clear that the writing in question does not constitute a contract in the absence of its acceptance, or of any action under it by the party whose duty it is to accept. It does not purport to be a contract between the parties. By it the plaintiff was not obligated to do anything on its part. The plaintiff does not undertake, by the terms of the writing, to ship the twine on the proposed conditions. It is merely a request or a proposition from the defendant to the plaintiff that, if the latter will ship certain goods, he will pay a certain sum therefor at a fixed time. It may be said to be an order, but it lacks an essential element of a contract, mutual assent. Being only a request or order, which required acceptance by the plaintiff to give it the force of a contract, it follows that it might be withdrawn or countermanded at any time prior to its being so accepted. We do not say that the acceptance must be a formal one. The acceptance might be shown by proving an act done on the faith of the order, such as the shipment of the goods ordered. But without an acceptance it is clear that the proposition is subject to be withdrawn by the proposer. It

is apparent, also, that counsel in preparing the petition deemed the writing of such a character that an acceptance of the order was necessary to be shown in order to recover, because it is expressly alleged therein "that said order was duly accepted by the McCormick Harvesting Machine Company, and twine purchased to supply the same," though there was no evidence that the company were compelled to, or did, purchase twine to fill this order.

It is said that this case is ruled by *Moline Scale Co. v. Beed*, 52 Iowa, 307, and *McAlister v. Safley*, 65 Iowa, 719. In the *Moline* case an order had been given for a scale to be built, and before the plaintiff received the order from its agent it was countermanded. The suit was for the contract price of the scale, and it was held that the plaintiff could not recover the contract price, as the contract was not such as to enable them to put the article sold in a condition so as to transfer the title to the property to the vendee. The question involved in this case was not decided in that one. The facts in the *McAlister* case were that the contract read, "I have this day bought," etc. On the back of the contract the parties to whom the order was given made an indorsement agreeing to give Mrs. Safley a choice of monuments. The indorsement was in effect an acceptance of the order, and showed a mutual agreement between the parties. There was no issue of acceptance of the order in the case. It was a case of a proposition completed by an acceptance, after which it could not be rescinded at the option of Mrs. Safley. Our holding herein in no wise conflicts with that case.

II. Error is assigned because of the court's ruling permitting the defendant to testify that when the order

a. —: —: —: was given it was delivered to the agent  
 evidence of contemporaneous parol agreement. subject to the approval and acceptance of the plaintiff company. The defendant

pleaded and introduced evidence to show that, at the time the order was signed and delivered to the plaintiff's agent, it was orally agreed that the order should be sent to the plaintiff, or to its general agent, for approval and acceptance, and that it was so sent. It is said by the plaintiff that the defendant was thus permitted to ingraft upon the contract a parol provision. We need not enter into a discussion of the proposition that a complete written contract can not be altered, changed, or enlarged by a contemporaneous parol agreement. We have no such case before us. As we have said, this writing, on its face, did not purport to be a contract. It was not error to admit evidence to show what was said at the time the order was made and delivered touching its acceptance. Such evidence did not tend even to contradict the writing. Under the law, the writing, to be effective to bind the defendant, must be accepted or acted upon by the plaintiff. To show that it was agreed that it should be sent to it for acceptance, was but showing what the law required before it could bind defendant. In *Morris v. Brightman*, 143 Mass. 149, 9 N. E. Rep. 512, the defendant gave a written order to an agent of the plaintiff for a safe. One day after giving the order he countermanded it. The defendant introduced evidence to show that when the order was signed and delivered to the agent it was agreed that the agent was to hold it three or four days, during which time, if the defendant made up his mind he did not want the safe, the agent should destroy the order, etc. The court held the writing was not a contract, and that the evidence was properly admitted. In *Refining Co. v. Miller*, 47 N. W. Rep. (S. D.), 962, evidence was admitted to show that it was agreed between plaintiff's agent and one of the parties to an order for goods that it might be countermanded, and it was held that such evidence was admissible. In the case at bar the writ-

ing was an order; was complete in itself; the evidence admitted in no manner changed or altered it, but tended to show the failure to perform another distinct act which was requisite to give the writing the force and effect of a contract.

III. It is insisted that it was error to permit the defendant to file the amendment to his answer at the 3. —: —: —: close of the testimony. It is said that the <sup>pleading:</sup> amendments. plaintiff had no notice of the defense thus presented, the failure to accept the order. The plaintiff, it occurs to us, is in no position to claim that it was prejudiced by this action of the court. It knew, or at least ought to have known, that the nonacceptance of the order would be relied upon as a defense to its claim. It had in its petition pleaded the fact of the acceptance of the order; the defendant in his answer denied it. It was in issue, and it should have been prepared to meet it. We do not say that the amendment was necessary; it simply set out more fully the facts touching the alleged agreement relating to the acceptance of the order. The amendment was, at least, proper. If, as the plaintiff claims, it was surprised or mislead thereby, it should have made timely application for a continuance. It did not do so, but proceeded with the trial, and it is too late now, under the circumstances, and after taking the chances with the jury, and being defeated, to claim prejudice from the filing of the amendment.

IV. It is said that the evidence and letters of the defendant show that he had waived the acceptance of the order by the plaintiff. No such issue is made, and, for all that appears, the question of the defendant's waiver of acceptance is raised for the first time in this court. The question of such a waiver was not raised by the instructions asked by the plaintiff. It appears not to have been brought to the notice of the trial court. We can not, therefore, consider it.

<sup>4</sup> PRACTICE in supreme court: questions considered on appeal.

Error is assigned on the ruling of the court in refusing to allow the plaintiff to ask the defendant on cross-examination whether the order he gave to the plaintiff the year before was given subject to approval. It is claimed an answer would have tended to show that the defendant got the two contracts mixed; that he was mistaken as to the 1891 contract. There was no error in excluding the testimony. The order in suit was in no way related to the one that had been given the previous year. Besides, so far as the witness, Matt Richardson, was concerned, he was asked if he was sure that he had not got what was said at the time the order in suit was taken mixed with what was said when he gave his order the year before, and answered he was sure about it.

VI. The contract was properly construed by the court, and the instructions given were correct. Those refused, where containing a correct statement of the law, were sufficiently covered by the charge of the court. While the evidence is conflicting, and while, sitting as jurors, we might have reached a different result, still there is evidence from which the jury might find that the order was not accepted when given, nor within a reasonable time thereafter, and not until after the defendant had countermanded it. We can not disturb the judgment below. **AFFIRMED.**

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IN THE MATTER OF THE ASSIGNMENT OF CADWELL'S  
BANK; STEPHEN KING, Assignee, Appellant;  
C. N. WOOD *et al.*, Appellees.

1. **Assignment for Benefit of Creditors: EXCEPTIONS TO REPORT OF ASSIGNEE: JURISDICTION.** A proceeding to determine the validity of objections to the report of an assignee, under a general assignment, for the benefit of creditors, is one at law.

2. ———: ———: REPORT OF CLAIMS FILED: WHAT ESSENTIAL. Under section 2120 of the Code, requiring assignees for the benefit of creditors, after three months, to file with the clerk of the court a list of all creditors of the assignor who have filed their claims with the assignee, "with a statement of their claims," the assignee must show in his report or by reference to proofs on file, and which are accessible, such facts in regard to the claims filed as will enable any person interested to investigate the claims and reach a conclusion in regard to their validity; and where a report is insufficient in this regard an objecting creditor will not be concluded by his failure to file exceptions thereto within three months after the filing of the report, as required by section 2121 of the Code.
3. ———: ———: ———: PAYMENT OF ILLEGAL CLAIM BY ASSIGNEE: JUSTIFICATION. Where the assignee of a partnership and of the estates of the individual parties, reported the claims filed against the respective estates merely by giving the names of creditors, the amounts of their claims, and the character thereof, and after the expiration of three months the court ordered the "equitable distribution" of the money in the hands of the assignee among the creditors who had proven their claims, *held*, that said order of court was not an adjudication of the validity of the claims filed, and did not justify the payment, in full, of claims filed against the estate of one of the individual partners, but which were in fact claims against the partnership, where it appeared that the funds in the hands of the assignee were insufficient to pay the partnership creditors in full.
4. ———: FILING OF CLAIMS WITH ASSIGNEE: FORM: SUFFICIENCY. An assignee is not required to report a claim filed with him, unless he is furnished by the creditor with such information as he is required to set out in his report.
5. ———: ELECTION OF CREDITOR OF PARTNERSHIP TO LOOK TO ESTATE OF INDIVIDUAL PARTNER. A creditor of an insolvent firm can not by waiving the right to enforce his claim against the partnership assets, receive payment out of the estate of one of the partners to the prejudice of other partnership creditors.
6. ———: PROCEEDINGS FOR REMOVAL OF ASSIGNEE: RESISTANCE: ATTORNEY FEES. Expenses incurred by an assignee for attorney fees in resisting proceedings for his removal, which were without merit, and which were ultimately dismissed by the court, are payable out of the funds of the estate.

*Appeal from Harrison District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, OCTOBER 18, 1893.

STEPHEN KING, as assignee of Phineas Cadwell and William C. Cadwell, reported as paid certain claims

made against the individual estate of Phineas Cadwell, and asked the allowance of certain other claims. The appellees filed objections to the report. The assignee filed an answer to the objections, and to that the appellees filed a reply. The issues thus raised were tried by the district court, and a judgment rendered disapproving and disallowing payments the assignee had made, refusing to allow certain claims, and fixing his compensation at an amount less than that he claims. From that judgment he appeals.—*Reversed* in part, and in part *affirmed*.

*S. I. King*, for appellant.

*John A. Berry* and *Thos. Arthur*, for appellees.

ROBINSON, C. J.—On the ninth day of October, 1888, Phineas Cadwell and William C. Cadwell executed to Stephen King a general assignment for the benefit of their creditors. They had been engaged as co-partners in doing a banking business at Logan, in Harrison county, under the name of Cadwell's Bank, and at Woodbine, in the same county, under the name of Boyer Valley Bank. The assignment included all partnership property, and the individual property of the partners not exempt from execution, and was duly acknowledged and recorded on the day of its date. King qualified as assignee, and on the twenty-ninth day of October, 1888, filed in the proper office an inventory and appraisal of the property transferred to him by the assignment, as follows: Of Phineas Cadwell, eighteen thousand, two hundred and twenty-seven dollars and seventy-one cents; of William C. Cadwell, ninety-five dollars; of Cadwell's Bank, twenty-three thousand, three hundred and fifty-two dollars and ninety-three cents; of Boyer Valley Bank, eleven thousand, six hundred and ninety-three dollars and thirty-nine cents. On the first day of November,

1888, the first publication of the notice of the assignment was made by the assignee. On the fifth day of February, 1889, he filed his report, which included a list of all persons who had claimed to be creditors of the individual assignors and of the partnership. The claims so made were as follows: Against the partnership to the amount of seventy-three thousand, four hundred and forty-six dollars and ninety cents; against Phineas Cadwell to the amount of four thousand, three hundred and eighty-nine dollars and thirteen cents; and against William C. Cadwell to the amount of six hundred and seventy-three dollars and four cents. In the list of claims against Phineas Cadwell were one in favor of Stephen King, the assignee, for one thousand, one hundred and fifteen dollars and seven cents, one in favor of C. L. Hyde for one hundred and fifteen dollars, and one in favor of Mrs. J. A. Smith for three hundred and five dollars. The claim of Stephen King was for money he had been compelled to pay as surety on a bond given by the Cadwells to the treasurer of Harrison county to secure the payment of deposits which the treasurer should make in Cadwell's Bank at Logan, and the claims of Hyde and Mrs. Smith were for money deposited in that bank.

On the sixth day of July, 1889, in vacation, one of the judges of the district court of Harrison county made an order addressed to the assignee, as follows: "It is hereby ordered that you make an equitable distribution of the money now in your hands belonging to the above named estate between the creditors thereof who have proved their claims entitling them thereto, as required by law; and it is further ordered that in making the above distribution you, as assignee, are at liberty, and are hereby authorized, to use and dispose of any notes in your possession belonging to said estate, at a sum not less than the face value thereof." The assignee thereupon paid the three claims

specified from funds realized from the separate property of Phineas Cadwell.

In September, 1889, the assignee asked an allowance for his services, and the sum of four hundred dollars was so allowed, not, however, as full compensation for the services rendered. In January, 1890, the assignee renewed his application for an allowance, stating that the reasonable value of his services from the date of the assignment to the first day of September, 1889, was the sum of one thousand, seven hundred and thirty-three dollars and sixty-seven cents.

On the twenty-eighth day of March, 1890, the assignee filed a report, showing that he had incurred an indebtedness to S. I. King in the sum of one hundred and five dollars, and to H. H. Roadifer in the sum of thirty dollars, for services rendered by them as attorneys in a proceeding instituted for the removal of the assignee. On the next day the appellees filed objections to the report, alleging that the payment of the claims of Hyde, Mrs. Smith and Stephen King from the assets of Phineas Cadwell was illegal; that the fees asked to be allowed in favor of S. I. King and Roadifer were not charges against the estate, but should be paid by Stephen King as an individual; and that the charge of the assignee for services is unreasonable, and excessive to the amount of one thousand dollars.

The district court found and adjudged that the claims of Hyde, Mrs. Smith, and Stephen King were in fact claims against the partnership estate of Cadwell's bank; that they had never been filed with the clerk of the district court, and that the report of them so filed only purports to give the amount claimed, name of the claimant, and to state that the claim was against the individual estate of P. Cadwell, without setting forth the facts on which the claim is based; that the order of July 6, 1889, was not an adjudication

of those claims, and did not direct the payment of them; that, at the time the order was made, neither the claim nor the report of the assignee was before the judge who made it. The objection to each of the claims was sustained, and it was ordered that the payment of each out of the estate of P. Cadwell was disapproved and disallowed, and the amount of the claims was charged against the assignee, in favor of the estate of P. Cadwell, but without prejudice to the right of the assignee to present to the court his claim as one for trust funds. The court sustained in part the objections to the claim for compensation made by the assignee, but allowed him one thousand, one hundred dollars in addition to the four hundred dollars theretofore paid, as compensation to January 1, 1891. It also sustained the objection to the fees claimed for Attorneys King and Roadifer on the ground that they were not chargeable against the estate of the Cadwells. It is from these findings, and the rulings and the judgment, that the assignee appeals.

I. There is some contention between the parties to this proceeding in regard to its true character, the appellant claiming that it is in equity, while the appellees contend that it is at law. There is nothing in its nature, nor in the relief demanded, to require the exercise of the equitable jurisdiction of the court, and it will, therefore, be treated as at law.

II. It appears from the reports of the assignee that the Cadwells are insolvent. All claims filed against Phineas Cadwell alone have been paid, but he is liable for the unpaid claims which are just demands against the partnership, and the property in the hands of the assignee is not sufficient to pay them. The appellees are creditors of the partnership, but, since its assets are inadequate to pay the partnership debts, they are interested

1. ASSIGNMENT  
for benefit of  
creditors: ex-  
ceptions to re-  
port of as-  
signee: juris-  
diction.

2. —: —: re-  
port of claims  
filed: what es-  
sential.

in the individual assets of each partner, and would be prejudiced by the payment in full therefrom of all the claims which should properly be treated as claims against the partnership, and as entitled to no priority over those of the appellees against the individual property of either partner. Section 2121 of the Code requires the court in cases of this kind to render such judgment "as shall be just." It would certainly be unjust to permit Hyde, King, and Mrs. Smith to be paid in full from the individual assets of Phineas Cadwell, and compel the appellees to accept but a part of their claims, since the claims of all these parties were for liabilities incurred by the partnership.

It is said that the appellees can not be heard to complain of the action of the assignee in paying the three claims specified, for the reason that they did not make timely objection to his doing so. Section 2120 of the Code provides that "at the expiration of three months from the time of first publishing notice, the assignee shall report and file with the clerk of the court, a true and full list, under oath, of all such creditors of the assignor as shall have claimed to be such, with a statement of their claims. \* \* \*" Section 2121 provides that "any persons interested may appear within three months after filing such report, and file with said clerk any exceptions to the claims or demand of any creditor. \* \* \*" It will be noticed that the list of claims in this case was filed with the clerk by the assignee more than a year before the objections of the appellees to their payment were made. The abstract recites that the report filed by the assignee "embraces a true and full list, under oath, of all persons who had claimed to be creditors of the assignors, with a statement of their respective claims;" but it is not shown what the statement contained, and we are compelled to resort to the finding of the court for information in regard to its contents. Sections 2120 and 2121, must

be construed together. When that is done, it is clear that the statement filed by the assignee must show such facts in regard to the claims filed as will enable any person interested to investigate the claims, and reach a conclusion in regard to their validity. It is not enough to state that a claim for a specified amount has been filed, but the nature of the claims, and upon what based, should be shown, either in the report itself or by reference to proofs on file and accessible to the persons interested, or by other means which will accomplish the same purpose. In this case the statement filed by the assignee only purported "to give amount, name of claimant, and that the claims were against the individual estate of P. Cadwell." The claims were not filed with the clerk, and it does not appear that their character was known to the appellees until they filed their objections. It may be that they could have attacked the report at an earlier date, and compelled a fuller statement in regard to the claims filed. Had the district court found that such was the case, and overruled the objections, because not made in time, we should not have disturbed its action in that respect. But a large discretion in settling estates of this kind is vested in the district courts. The assignee is "at all times subject to the order and supervision of the court or judge" for the purpose of securing "the faithful execution of the duties required by" the statute. The payment in full of the claims in question from the assets of Phineas Cadwell was grossly unjust to the appellees and to other creditors of the partnership, and the act of the assignee in making such payment was chiefly for his own personal benefit.

III. It is said that, as no objections were made to the claims in question within three months from the time the assignee filed his report showing a list of the creditors, he had no discretion, under the order of July 6, 1889, but was required to pay them. That order did not

2. —: —: —:  
payment of  
illegal claim  
by assignee:  
justification.

purport to be an adjudication of any claim, nor to direct its payment. It merely authorized an "equitable distribution" of the money in the hands of the assignee among the creditors who had proven their claims and were entitled to share in the distribution. The distribution made was not according to the rules of equity. *Smith v. Smith*, 87 Iowa, 93. The assignee is not required to pay an illegal claim merely because no objection to it is made by a creditor. If in doubt in regard to his duty, he could have applied to the court or judge for instructions; but he did not do so, and the district court may well have found that his act in paying the claims was not in good faith, and that it could not be approved.

IV. It is said the statute does not require a creditor to file his claim with the assignee; that the latter is powerless to obtain a copy of it; and, therefore, that he can not be required to set it out in his report. Whether it is necessary for all claims to be filed with the assignee we need not determine. It is clear that he can not be required to list a claim of which he knows nothing, and that he should be furnished by the creditor with such information, at least, as he is required to set out in his report. A claim can not be said to be exhibited to the assignee within the meaning of the statute, until he shall have had an opportunity to examine it fully, and, if necessary, to obtain a copy of it, and of the proof accompanying it. Moreover, in this case the claims were filed with the assignee, and he was fully informed of their character before he made his report, and before any payment was ordered.

V. It is insisted that the claim of Stephen King was properly filed against Phineas Cadwell alone, for the reason that the bond under which King's liability arose was executed by the Cadwells as principals, and not by Cadwell's bank. The bond was given for a

4. —: filing of claims with assignee: form: sufficiency.

5. —: election of creditor of partnership to look to estate of individual partner.

partnership purpose, and the liability of the Cadwells to King was for a partnership obligation. The claim was, therefore, against the partnership. The fact that King might have made a demand for the payment of his claim against either partner, and waived it as against the other partner and the partnership, is not important to a determination of the question under consideration; and the same is true of Hyde and Mrs. Smith. They can not prejudice other creditors by making an election of that kind. The proofs of these claims showed upon their face that they were for the partnership liabilities; and nothing in the order of July 6, 1889, nor in the condition of the several estates included in the assignment, required him to pay them in full from the individual assets of Phineas Cadwell.

VI. The facts in regard to the fees claimed by S.

I. King and Roadifer appear to be substantially as follows: An application was made to the court for the removal of Stephen King as assignee. It was resisted by him, S. I.

King and Roadifer acting as his attorneys, and, after a hearing, was dismissed. There is no suggestion in the record that the assignee acted in bad faith in the matter, nor that the application was well founded; while the action of the court in dismissing it tends to show that it was without merit. The services rendered by the attorneys were worth the amounts claimed. Since the services were rendered to defend the right acquired by the assignee through the assignment, from an unwarranted attack made without fault on his part, we think the compensation therefor should be allowed from the fund in his hands as expenses incurred in protecting the interests of the estate. 2 Perry on Trusts, section 910; Burrill on Assignment, section 417.

VII. Complaint is made of the compensation allowed to the assignee. In regard to that it is only

6. —: proceed-  
ings for remov-  
al of assignee:  
resistance: at-  
torney fees.

necessary to say that the evidence tends to show that the allowance made was ample for the services rendered.

The conclusions announced dispose of all material questions presented for our determination. The matters in controversy are so distinct and separated that our judgment will be final as to so much of the action of the district court as is affirmed. Two thirds of the cost of the appeal will be taxed to the appellant, and one third to the appellee. The judgment of the district court in disallowing the charges of S. I. King and H. H. Roadifer as claimed against the estate of the Cadwells is REVERSED; in all other respects it is AFFIRMED.

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EDITH J. HENRY, Appellant, v. SYLVESTER S. GRIFFIS  
*et al.*, Appellees.

1. **Estates of Decedents: PAYMENT OF REQUESTS: CONVERSION BY EXECUTOR: LOSS CHARGEABLE PRO RATA TO SHARES OF BENEFICIARIES: LIEN UPON REAL ESTATE.** A testator having two sons and a daughter, devised all of his real estate to his sons, and bequeathed a sum of money to his daughter, the will providing that, if the personal estate proved insufficient to pay the bequest, the sons should make good the deficiency. The division of the property was such as to indicate an intention on the part of the testator to divide his estate equally among his three children. The executor qualified with S., one of the sons, as surety on his bond, and thereafter converted all of the proceeds of the personal estate in his hands to his own use; but the whole of said personal estate was insufficient to pay the bequest to the daughter. *Held*, that the effect of the will was to create a lien upon the real estate devised to the sons for the amount of the deficiency in the personal estate for the payment of the bequest to the daughter; that the loss to the estate on account of the conversion of the executor was chargeable to the estate, and should be borne *pro rata* by the beneficiaries under the will; and that the share of said loss which was chargeable to S. was, by virtue of his legal obligation under the provisions of his will, a lien upon the real estate devised to S. regardless of his obligation upon the bond of the executor.
2. ———: ———: ———: ———. The will being of record, and being the basis of the title of S. to the real estate received under the will, *held*, that a grantee of said real estate took the same subject to the liens above referred to.

*Appeal from Lee District Court.*—HON. J. M. CASEY,  
Judge.

WEDNESDAY, OCTOBER 18, 1893.

ACTION to set aside a conveyance of real estate. There was a judgment for the defendants, and the plaintiff appeals.—*Modified and affirmed.*

J. D. M. Hamilton and D. F. Miller, Jr., for appellant.

D. F. Miller, Sr., for appellees.

GRANGER, J.—I. R. E. Griffis died testate on the sixth day of May, 1887, leaving surviving him three children, they being the plaintiff, the defendant Sylvester S. Griffis, and Herbert L. Griffis. By the terms of his will, he gave to Sylvester S. one hundred and one acres of land, and to Herbert L. one hundred and sixty acres, the two devises constituting his entire real estate. To his daughter, the plaintiff, he bequeathed the sum of five thousand, six hundred dollars with the following provision: "If there is not personal property and money enough to make the amount, the boys is to pay enough to make the amount." One John Bullard was designated in the will as executor, and qualified as such. The sureties on the bond of the executor were Sylvester S. Griffis and one A. Bullard. Sylvester S. Griffis signed the bond on the seventeenth day of October, 1887. On the twelfth of the same month he was married to his codefendant, Jennie Griffis. On the twentieth day of December, 1888, Sylvester S. Griffis made to his wife a conveyance of the land devised to him; the consideration therefor being her marriage to him, in pursuance of an antenuptial contract. On the eighth day of

1. ESTATES of decedents: payment of bequests: conversion by executor: loss chargeable pro rata to shares of beneficiaries: lien upon real estate.

April, 1890, the plaintiff obtained against Sylvester S. Griffis a judgment in the sum of two thousand, one hundred dollars. This suit is to cancel the conveyance by Sylvester S. Griffis to Jennie Griffis, and subject the land to the payment of the judgment.

To a proper consideration of the case, it is important to understand the character of the claims that make up the amount of the judgment. The record is somewhat obscure in some respects. The following from the judgment entry in that case, will show the necessary facts:

"The court also further finds that on the twenty-fifth day of April, 1889, the said John Bullard, as such executor, made a report of his doings to this court, and it was shown by said report that he had in his hands four thousand, two hundred and seven dollars and five cents as such executor, and as further shown by certain citation proceedings in this court, that the said John Bullard had appropriated all of said funds to his own individual use. The court further finds that on the sixth day of December, 1889, the plaintiff, after making due demand for the legacy due her under the will of her father, upon said executor, commenced an action upon the executor's bond in this court, seeking to recover the amount due her thereunder, and that said proceedings were compromised, and under the terms of the compromise the defendant was to pay to this plaintiff the sum of one thousand, two hundred dollars and that said executor, John Bullard, and his wife, and the defendant herein, made and executed their promissory notes to the plaintiff, bearing date January 10, 1890, payable in one, two and three years, in the sum of four hundred dollars each; and it is also further found, when the plaintiff accepted said notes, it was expressly understood and agreed that the said defendant would secure the payment thereof; that he had been requested so to do, but

refuses to give the plaintiff any security, and the plaintiff has tendered said notes back to the defendant, and he has declined to receive the same, and that said notes are now in the possession of the plaintiff herein, subject to the defendant's order and control. It is further found by the court that there is still due this plaintiff, under the will of her father, which has been hereinbefore referred to, and as coming from the said defendant under the provisions thereof, after applying all the personal property found in the hands of the executor, the sum of seven hundred and fifty dollars and that she has made demand upon said defendant for payment thereof, and said defendant refused, and still refuses, to make payment to her of said amount."

It will be seen that the items of that judgment are, first, one thousand, two hundred dollars, agreed to be secured under the compromise of a suit on the executor's bond, and seven hundred and fifty dollars, being the one half of the amount remaining due the plaintiff from Sylvester and Herbert because the "personal property and money" were not sufficient to pay the bequest of five thousand, six hundred dollars, with, probably, the interest on the two items. The district court, in this case, decreed that part of the judgment in that case representing the seven hundred and fifty dollars, with the interest thereon since August 5, 1891, a lien on the real estate in question, but denied such a lien as to the remainder of the judgment, being that part representing the one thousand, two hundred dollars and interest. The defendants do not appeal, and hence the controversy is as to the right of the plaintiff to have the balance of the judgment, also, a lien.

It will be well to first consider the effect of the will upon the real estate devised to Sylvester for the payment of any deficiency because of the personal estate being insufficient to pay the bequest to the

plaintiff. We mean, in this connection, the deficiency without regard to the defalcation of the executor. The district court, in making the seven hundred and fifty dollars a lien on the real estate, must have applied a rule of law that the effect of the will was to create such a lien, and we are in accord with that view. Of course, such a purpose on the part of the testator is only to be inferred; but the inference must be a necessary one, to effectuate the testamentary intention, for it should be presumed that the testator designed that his estate, rather than the personal property of his devisees, should stand as security for the fulfillment of his bequests, or, in other words, the due execution of his will. Courts should not and will not sanction such a substitution, as security, to the prejudice of a beneficiary, in the absence of a clear intention on the part of the testator. The consequences of the opposite rule are manifest in this case, where the substitution of personal security would take from one beneficiary, against a manifest intention of a testator, and give to another. In cases of doubtful construction, that one should prevail that will insure just results, and preserve a fair administration of the law.

We may now properly consider the case as to the one thousand, two hundred dollar item, and it is to be kept in mind that this item is not one arising out of a deficiency of the personal estate to meet the bequest to the plaintiff, as contemplated by the testator, but it arises out of a loss to the estate by the misconduct of the executor selected by the testator to carry out the terms of his will. It will be well to first consider how the estate should be affected by such a loss, without reference to any questions pertaining to the bond; that is, without reference to the suit on the bond, or the fact that Sylvester Griffis was a surety thereon. Viewing the case in the light of a loss of upwards of

four thousand dollars of the personal estate, from which, under the terms of the will, the bequest to the plaintiff was to be paid, would a just construction entail such a loss entirely upon her, or upon the devisees, or upon all? The record affords some reasons for thinking that the testator intended to deal with his children substantially alike; that is, to give to them property of nearly the same value, and, as we have said, that his estate should be security for the observance of his purpose. It seems to us that this manifest intention should be prominently in view, in solving the problem of how a loss to the estate should be met. In the light of this thought, it would be a very inequitable rule to say that, if the entire personal estate was lost before payment of the bequest to the plaintiff, the sons should make good the entire amount, and save the plaintiff entirely from loss, and it would seem equally inequitable, with the same facts, to say that the plaintiff should lose all, and the sons take the entire estate. It would, however, seem equitable that the estate should be charged with such a loss, and that it should be borne *pro rata* by the beneficiaries of the will. We regret that we are without precedent to aid us in the solution of this question, because of its particular as well as general importance. This view is not in harmony with either contention, appellant's claim being that the real estate should, under a fair construction of the will, be security against any loss to her; and that of the appellees, that it is in no way liable. We may now see how the situation is affected because of the suit on the executor's bond, the settlement of the same, the suretyship of Sylvester Griffis, and the conveyance in pursuance of the antenuptial agreement.

We do not understand from the record that, of the defalcation, more than one thousand, two hundred dollars due from Sylvester, and forming a part of the

judgment, is unsettled. The record is obscure in this respect. The entire defalcation seems to have been adjusted on the basis of notes being given for three thousand, six hundred dollars, one third of which was assumed by Sylvester, and is the one thousand, two hundred dollars included in the judgment, for the payment of which a lien on the land is now sought. It is somewhat significant that the amount thus included in that payment is the proportion which we hold should be adjusted by Sylvester as his proportion of the loss to the estate by the defalcation, regardless of his obligation as surety on the executor's bond; that is, it is the part of the loss for which his proportion of the property from the estate stands as security. Assuming, as we may, that other parties have canceled the other part of the defalcation without judgment on the bond, why should we not assume that this part is left to Sylvester as his legal obligation under the provisions of the will? Such a conclusion seems to us both reasonable and just.

II. It only remains for us to consider the effect of the conveyance to the defendant Jennie Griffis upon the

a. —: —:      lien that might otherwise attach to the  
—: —:      land. As to the conclusion in this respect, there is little room for question. Conceding the validity of the antenuptial agreement, which we find it unnecessary to decide, it was made in full view of the fact that Sylvester's title was burdened with such obligations as might arise in carrying into effect the provisions of the will; that is, in the adjustment of property rights between legatees under the terms of the will. In so far as the will placed the land in the line of security for the carrying out of its provisions, she was bound to take notice, for the will was the basis of title for Sylvester, and was a matter of record.

The suit on the executor's bond was concluded without judgment, and there has been no adjudication

of the rights of the parties under its conditions, nor does this case involve such a question.

These considerations lead to the conclusions that the decree of the district court should be so far modified as to include in its lien the entire judgment for one thousand, two hundred dollars, and interest. This conclusion has the charm of being absolutely just, as between the parties, and not permitting a transaction of at least doubtful integrity to place the property where the intent of the testator would be defeated. The costs of this suit in both courts will be taxed to appellees. The judgment of the district court is MODIFIED AND AFFIRMED.

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SAMUEL ZWICK, Appellee, v. G. W. JOHNS, Appellant.

1. **Estates of Decedents: ELECTION OF WIDOW TO TAKE HOMESTEAD.** Where a homestead was occupied by a widow and her minor children for nearly six years after the death of her husband, *held*, that the presumption, arising from such occupancy, of an election to take the homestead for life in lieu of her distributive share, was not overcome by evidence that she, at one time, commenced proceedings to have her distributive share set off to her, but which she afterwards abandoned, and determined to occupy the homestead in lieu of such share; that she and a husband by a subsequent marriage gave a quitclaim deed to the land as security, and at the same time executed a mortgage upon the unassigned dower interest of the wife, and that the latter, about an hour before she died, but when very feeble, promised one to whom she had become indebted a mortgage upon the land.
2. ———: **HOMESTEAD: ABANDONMENT.** After her occupancy of the homestead for nearly six years, the wife being in ill health and unable to attend to the duties of the farm, she and her husband by the subsequent marriage, sold their household goods, leased the farm for two years, with the intention of returning at the end of that time and again occupying the homestead, and went to another state, where the wife died in less than a year, and none of the family returned to again occupy the homestead. *Held*, that the homestead was not abandoned, and that the title thereto descended to the wife's children.

89	550
998	42
998	45
89	550
105	218
105	375
89	550
107	288
89	550
109	707
89	550
115	399
89	550
118	485
89	550
131	175

3. ———: ———: ———: EXECUTION SALE: ESTOPPEL. The fact that the defendant purchased the premises at execution sale upon the faith of said lease of the land, and the removal of the family to another state, and in ignorance of any claim of a homestead right therein, *held*, not to operate as an estoppel against the plaintiff's claim, as guardian for the minor children of the wife, to have his title to said property quieted as against the defendant.

*Appeal from Cherokee District Court.*—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, OCTOBER 18, 1893.

ACTION in equity to quiet title to certain lands. From a judgment and decree for the plaintiff, the defendant appeals.—*Affirmed*.

*Ernest C. Herrick*, for appellant.

*J. D. F. Smith*, for appellee.

KINNE, J.—The facts of this case, disclosed by the pleadings and evidence, are that one John R.

Smith died on May 28, 1882, seized of eighty acres of land in Cherokee county, Iowa. He left a widow, Dena A. Smith, and four minor children. At the time of his death, and for several years prior thereto, Smith and his family had lived upon and occupied said premises as their homestead. After his death the widow and children continued to occupy said land as a homestead until the fall of 1883, when the widow married one Joseph Prinkey. After that they all occupied said premises as their home until early in 1888, when they sold all of their personal property, except bedding, and went to Freeport, Illinois, and none of them ever returned to this state. Mrs. Prinkey died at Freeport in the fall of 1888, leaving surviving her the four said minors and her husband. The plaintiff was appointed in this state as the guardian of said minors, and brings

1. ESTATES of decedents: election of widow to take homestead.

this action to restrain the defendant from interfering with his possession of the premises in question. Mrs. Prinkey and her husband, prior to leaving Iowa, became indebted to the defendant. He reduced his claim to judgment, caused an execution to issue thereon, and thereunder sold an undivided one third of said eighty acres of land, and in due time received a sheriff's deed therefor. It is averred in the petition that Mrs. Prinkey never elected to take any portion of said land as her property in fee simple, but occupied the same as a homestead. The answer denies that allegation of the petition, and alleges that prior to the levy of the defendant's attachment Mrs. Prinkey and her husband had abandoned the premises as a homestead. It is also claimed that the defendant acted thereon, and without any notice of any claim of a homestead right by either Mrs. Prinkey or her husband. That the defendant, in good faith, purchased the land at execution sale, and that thereby the plaintiff is estopped to claim the same.

The facts touching the alleged abandonment of the homestead are that in 1884 the widow filed her petition in the circuit court of Cherokee county, asking to have her distributive share in said real estate set off to her; that afterwards she changed her mind, and abandoned said proceedings, and determined to occupy the homestead in lieu of such distributive share; that she so told her counsel and various relatives; that in August, 1887, she and her husband quitclaimed all their right and interest in the land to one Groff, said deed being in fact made as security for a debt. At the same time they executed a mortgage on the unassigned dower interest of Mrs. Prinkey in the eighty acres to the same party to secure the payment of a note. In the spring of 1888, Mrs. Prinkey was suffering from disease to such an extent as to be unable to perform her work upon the farm, and she, acting in her own right and as guardian, leased the land to Joseph M. Smith for a

term of two years. The family then disposed of all their personal property, except bedding, and went to Freeport, with the intention of having Mrs. Prinkey placed under medical treatment, and expecting and intending, when she recovered, and at the termination of the lease, to return to and again occupy the farm as their homestead. While in Freeport she grew worse, and died in the fall of 1888. During her stay in Freeport, and but an hour before she died, she told one Ball, to whom she had become indebted, that she would give him a mortgage on her interest in this land to secure him. The mortgage was never executed.

I. Two questions are presented for our determination: *First*, did the acts of Mrs. Prinkey show an election on her part to take a homestead in the land in lieu of her distributive share? and, *second*, if she did so elect, did she afterward abandon the homestead? Under Code, section 2440, Mrs. Prinkey became entitled to have set apart to her as the widow of Smith one third in value of the land of which he died seized. Under section 2007 she had the right to continue to occupy the homestead until it was otherwise disposed of according to law; and under section 2008 she might elect to retain the homestead for life in lieu of her distributive share in her deceased husband's real estate. Now, what acts will constitute such an election? We do not deem it necessary to review the many cases touching this question, for the reason that this court, in a recent case, has, after full consideration of them, established a rule, which we think is well supported in reason and authority, as to what occupancy of the homestead will be considered an election to take a homestead for life in lieu of a distributive share. This rule as laid down in *Egbert v. Egbert*, 85 Iowa, 525, is that when, under all the circumstances, the survivor has occupied the homestead for a reasonable time in which to make an

election under the statute, and has failed to have the distributive share set apart, or otherwise made an election, the presumption of an election from such occupancy arises. Such presumption will then prevail, unless overcome by proof showing election to the contrary. Under this rule it must be held that the surviving wife in this case had elected to retain the homestead for life in lieu of her distributive share of her deceased husband Smith's estate. Smith died in May, 1882. There was at that time nothing in the physical condition of his surviving wife, nor in her surroundings, which in any way prevented her exercising her election within a reasonable time after his death. She remarried in 1883, and occupied the premises as a homestead until February, 1888, and was in fact thereafter in the possession and occupancy of the premises by her tenant until her death in the fall of the same year. She had once begun proceedings to have her distributive share set apart to her, but had changed her mind, and abandoned them. She had executed a deed of the premises as security. She executed a mortgage on her undivided share to secure a debt, and just before her death she proposed to mortgage her interest in the land. Are such facts sufficient to show an election contrary to that presumed from her occupancy of the land for six years after her husband's death? We think not. The fact that she had at once commenced proceedings to have her share set apart to her, and had abandoned the same, after being fully advised of her rights, and determined to retain her homestead right is a cogent reason for believing that she did not thereafter, even by executing the deed and mortgage, intend to take a distributive share. It must be remembered, when these instruments were executed she was in feeble health; it was only about a year before her death. Nor do we give much weight to the fact that an hour before her death she was proposing to mortgage her interest in the

land. Such evidence, even if admissible, is of little force, inasmuch as it appears she was near dissolution, and not able to speak above a whisper. The evidence shows that after she abandoned the suit which she had commenced to have her distributive share set apart, she always expressed herself as intending to take the homestead; that she left the farm only because forced to do so by reason of ill health; that she leased it, acting for herself in the manner chosen. We can not review all of the evidence, but, from a careful examination of all of it, we are satisfied that the presumption of an election to take the homestead which arises from occupancy, has not been overcome by evidence of an election to take a distributive share. This case is clearly distinguishable from *Wilcox v. Wilcox*, ante, page 388. In that case an election to take the distributive share had in fact been made, and it was sought to withdraw it after the widow had mortgaged such share. It was held she could not thus defeat the mortgage security.

II. Was the homestead abandoned? The evidence is without conflict that Mrs. Prinkey and the family intended to return, at least by the time the lease expired. The removal to Freeport was for a temporary purpose, to be treated for the disease with which Mrs. Prinkey was afflicted. There was a fixed and definite intention to return to the homestead, which was only defeated by the death of Mrs. Prinkey. We discover no sufficient evidence to show an abandonment. We need not cite cases, as the facts in each case are different, and each must, in a large measure, be determined upon its own facts.

III. The decree below, finding title to the premises in controversy in the minor heirs of John R. Smith, as in all other respects, is correct. The claim of estoppel is without merit. There was no evidence to show that the defendant was misled into doing any act in connection with

2. —: home-  
stead: aban-  
donment.

2. —: —: —:  
execution  
sale: estoppel.

acquiring a deed to the land by any act or statement of Mrs. Prinkey. The mere fact that he knew that she had leased the land and moved to another state, and that he was ignorant of any claim of homestead right therein, can not be held to work as an estoppel to the plaintiff's claim. **AFFIRMED.**

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JOHN F. NEARY, Appellee, v. H. B. JONES, Appellant.

1. **Boundaries: PROCEEDING BEFORE COMMISSIONERS: SUFFICIENCY OF NOTICE.** The proceedings of commissioners appointed by a court to establish boundaries will not be held void because of the failure to give formal notice of the survey and bearing to a party in interest, where it appears that such party and one of his attorneys knew, when testimony was being taken, and testified before the commission, that they declined to furnish other evidence, though requested to do so, and that the attorney was with the commissioners when the survey was made.
2. ———: ———: **SURVEY: EVIDENCE.** Upon proceedings before commissioners to fix the boundary between two city lots, evidence having been introduced showing that one of the corners of the block in which the lots were situated had never been lost or in dispute, and the commissioners tested the location of the corner by measurements and alignments to original corners not in dispute, which showed that the corner was correctly located, *held*, that the commissioners were justified in making such corner the starting point of their survey, and that the survey was not subject to objection because a certain corner marked by a permanent monument was not made the starting point, though in such event a different result would have been obtained.
3. ———: **ESTOPPEL.** Although the defendant had once moved his building to a location that he supposed was wholly upon his own lot, *held*, that the plaintiff was not thereby estopped from claiming that such building rested partly upon his lot.
4. ———: ———: **COSTS.** In view of the evidence as to the corners in question, *held*, that one half of the costs of the proceeding was properly taxed to each party.

*Appeal from Palo Alto District Court.*—HON. GEORGE H. CARR, Judge.

WEDNESDAY, OCTOBER 18, 1893.

PROCEEDING to establish a lost corner. There was a judgment and decree for the plaintiff, and the defendant appeals.—*Affirmed.*

*Soper, Allen & Morling*, for appellant.

*Thos. O'Connor*, for appellee.

KINNE, J.—This action was originally ejectment for the possession of a strip of land on the boundary between lots 7 and 8 in block 37 of Corbin & Lawler's plat of the town of Emmetsburg, Iowa. The plaintiff owns lot 7, and the defendant owns lot 8, which lies directly south of lot 7; the defendant has a store building and barn on his lot, and it is alleged that they encroach upon the plaintiff's lot. The defendant denies that the buildings are on the plaintiff's lot, and avers that the corner between these lots, and other corners in the east half of block 37, are lost or in dispute, and asks that the owners of the other lots in the east half of said block be brought in, and commissioners be appointed to make a survey and establish corners as provided by the statute, which was done. The commissioners filed their report. The defendant filed exceptions thereto; also a motion to reject the report. The exceptions and motion were overruled. The defendant then filed a motion to modify the report, and for judgment, which was also overruled. Judgment was then entered confirming the report of the commissioners, from which this appeal is taken.

I. It is contended that the defendant was not notified of the meeting of the commission, the survey, or taking of evidence, and hence the proceedings were void. The statute makes no provision for such a notice. Chapter 8, Acts of the Fifteenth General Assembly.

1. BOUNDARIES:  
proceeding  
before com-  
missioners:  
sufficiency  
of notice.

In *Nesselroad v. Parish*, 52 Iowa, 269, 271, this same question was raised, and it was held that, as the statute did not provide for notifying the parties of the time of making the survey, notice could not be considered as jurisdictional. Counsel for the appellant with much force insists that notice is jurisdictional.

As we view this case, we are not called upon to review that question. The object of notice, even if required in such cases would be to advise the party as to the fact that the commissioners were about to make a survey, and take evidence, so that an interested party might be present, if he desired, and produce any evidence he might have which might tend to show the exact location of the corner or line in controversy. If this opportunity was open to the defendant, and if he knew when the survey was to be, or was being, made, and if he had a reasonable opportunity to introduce his evidence before the commissioners, then the purpose and effect of a notice would have been accomplished. It is not claimed that any formal notice was served. It is not denied that the defendant and one of his attorneys testified before the commission. From the testimony taken upon the hearing on the exceptions and motion it appears that the defendant's attorney knew the commissioners were at work making the survey, and was with them some of the time; that both he and the defendant knew when testimony was being taken; that the defendant was advised by the commissioners that they wanted him to produce his testimony; that he refused because his attorney was not there. There is some contention as to what time in the evening it was that the defendant was notified to bring his witnesses; and, if it be conceded that the hour was unreasonable, it sufficiently appears that the defendant could have introduced his witnesses the next day, if he had desired so to do. We conclude, then, that the defendant had information of all the proceedings.

II. Notwithstanding our conclusion, if it appeared that material evidence had been omitted, to the prejudice of the defendant, we should feel it <sup>2 —: —: survey: evidence.</sup> our duty to reverse the case. Under our holding in *Williams v. Tschantz*, 88 Iowa, 126, that this is a proceeding to fix the true line, and determine the rights of the parties not only with reference to the location of the government corners, but as to the lines as they may have been established by adverse possession, or by acts of acquiescence of the parties, it becomes important that all parties in interest should have reasonable opportunity to be heard in person and through their witnesses.

Was material evidence omitted, to the defendant's prejudice? We think not. It is objected that the starting point of the survey was from an iron pin at the southeast corner of block 37. It is said the fact that the pin is located at the original corner is in dispute. No one disputes it, except McCarthy, and he testifies with reference to it that when he and Harrison put the iron pin there "he would not say whether we found the old stake, but my recollection is we found the old pieces of wood, but don't know." Harrison testifies that that corner had always been preserved and maintained, by a stake at first, and afterwards by an iron pin; and that he has owned lot 11, the southeast corner lot in the block, ever since the block was platted. He says, "The southeast corner of the block has never been lost or destroyed or in dispute." The commissioners, in addition to the evidence as to the pin being at the southeast corner of the block, tested the location of the pin by measurements and alignments to the northeast corner of block 57 to the southwest corner of lot 11 in block 37, all of which points were original corners, as is shown by the testimony.

It is insisted that the starting point should have been the section corner one square north of block 37,

which is marked by a permanent monument, and that a survey so made would fix the corner in dispute between the buildings of the plaintiff and defendant, and several inches north of the point fixed by the commissioners. It is evident that the starting point of the survey made by the commissioners was not only established by the testimony as being the precise location of the southeast corner of the block as originally surveyed, but the tests adopted measuring and aligning to other undisputed corners showed that the pin was in fact at the southeast corner of block 37. We do not know of any rule that would compel the commissioners to resort to every known test to ascertain the correctness of the starting point; and when, as in this case, the correctness of the initial point was not only ascertained from the testimony, but made certain by proper measurements and alignments from three other known and undisputed original corners, it would seem that it should be sufficient.

Counsel argue, if the tests were right, the point of commencement must have been wrong, because they found a surplus "on the east side of the east half of ninety-one hundredths feet, while on the west line of the east half it is only fifty-five hundredths, a difference of thirty-six hundredths in one hundred and twenty-nine and five tenths feet." Such a result does not necessarily follow. Grout, one of the commissioners, testifies touching this surplus, over the twenty-four feet, as follows: "Originally these lots were supposed to be twenty-four feet. That was the intention; but the ground was rolling, and considerable grass. Harrison was very anxious to get these corners and measurements exact. We had a link chain, which you can't depend on hardly an hour at a time. We used our twenty-four foot measure after we got the two hundred and sixty-four feet with the link chain. Then we made measurements, and set the pins out at

twenty-four feet. Frequently a discrepancy would be found at the last measurement; then the rule was to distribute that with each one of these pins as we went back. The block corners were tested, most of them."

III. It is said the plaintiff should be estopped from now claiming that the defendant's building is on his lot, as in 1887 the defendant moved  
 3. —: estoppel. his building, so that he supposed it was all on his own lot. We see no reason why the plaintiff should be estopped from making his present claim.

IV. The owners of five other lots in block 37 were made parties to this proceeding, and it is insisted that  
 4. —: —: costs. they should pay their proportionate share of the costs. In view of the testimony as to the corners of these lots found by the commissioners, we think the court did not err in taxing one half of the costs to each party. On a careful reading of all the evidence, we are impressed with the belief that all parties in interest have been fully heard, and that the result reached by the district court is just. We do not think that the defendant's rights have been in any way prejudiced by the manner in which the proceedings before the commissioners were conducted.

The judgment below is AFFIRMED.

89 561  
119 517

M. J. CAMERON, Appellant, v. LENA KAPINOS,  
 Appellee.

1. **Liquor Nuisance: VIOLATION OF INJUNCTION: CONTEMPT: ACTION TO MAKE FINE A LIEN ON REAL ESTATE: PARTIES.** Where an action to enjoin a liquor nuisance was properly brought in the name of a citizen of the county, such citizen may maintain an action to make a fine, imposed for the violation of the injunction issued in the former action, a lien upon the real estate where such nuisance was maintained with the consent of the owner.

2. ———: ———: ———: ———. Under the provisions of section 12, chapter 66, of Acts of the Twenty-first General Assembly, making all fines and costs assessed, or judgments rendered, of any kind, against any person for any violation of an injunction against the use of premises for the unlawful sale of intoxicating liquors, a lien upon premises used for such purpose, with the knowledge of the owner thereof or his agent, *held*, that a fine imposed in a contempt proceeding for the violation of an injunction, together with the costs of such proceeding, were enforceable against premises used for such purpose by the agent of the owner, and with her knowledge, though she was not a party to the contempt proceeding.

*Appeal from Winneshiek District Court.*—HON. L. O. HATCH, Judge.

WEDNESDAY, OCTOBER 18, 1893.

PROCEEDING in equity to subject real estate owned by a wife to the payment of a fine and costs adjudged in a contempt proceeding against the husband. A demurrer to the petition was sustained, and the plaintiff appeals.—*Reversed*.

*John B. Kaye*, for appellant.

*E. R. Acers* and *L. L. Ainsworth*, for appellee.

KINNE, J.—In 1887 in an action in the Winneshiek district court wherein this plaintiff was the plaintiff, and this defendant and one Frank Kapinos, her husband, and lots 1, 2, 3, and the buildings thereon, in the village of Spillville, in the said county, were defendants, a temporary writ of injunction issued, enjoining the defendant, Lena Kapinos, from keeping, using and occupying said premises and the buildings thereon for the purpose of keeping, selling, giving away or storing therein intoxicating liquors in violation of law, and restraining and enjoining the said Frank from selling or giving away, or keeping for the purpose of sale, gift or disposal on said premises or in the buildings thereon, any intoxicating liquors in vio-

lation of law. The writ was duly served on April 22, 1887. The petition in that action charged Lena Kapinos to be the owner of the premises therein described. At the August, 1887, term of said court a decree was entered declaring said premises to be a liquor nuisance, and finding that said Lena Kapinos was the owner of the premises, and knowingly permitted Frank Kapinos to use the same for the unlawful sale and keeping of intoxicating liquors; also, ordering the nuisance abated, and the injunction made perpetual. It is charged in the petition in this case that said Lena has ever since been, and still is, the owner of said premises; that between June 10, 1890, and May 12, 1891, the said Frank Kapinos, in violation of law and of said decree and writ, used said premises for sale therein, and storing therein intoxicating liquors, and selling the same therein and thereon, both by himself and agents; that on May 18, 1891, the plaintiff filed in court his affidavit charging said Frank Kapinos, the husband and agent of this defendant, with having sold, between said dates, intoxicating liquors on said premises to various persons in violation of law, and with keeping intoxicating liquors thereon with intent to sell the same unlawfully; that at the May term, 1891, of said court, on said hearing, against said Frank Kapinos for contempt, and on July 3, 1891, judgment was rendered finding him guilty, and imposing a fine of seven hundred dollars and costs. It is also averred that said fine was imposed on Frank Kapinos for selling, storing and keeping for sale intoxicating liquors on said premises with the knowledge of this defendant, and that no part of the fine has been paid. The prayer is that the judgment and fine be decreed a lien upon said premises. The defendant demurred to the petition on the grounds, *first*, that the plaintiff has no legal capacity to sue; *second*, that the facts stated do not entitle the plaintiff to the relief demanded.

The demurrer was sustained, the plaintiff excepted, and elected to stand on his petition, and appeals.

I. The first ground of the demurrer goes to the question of the capacity of the plaintiff to sue. The statutes

1. Liquor nuisance: violation of injunction: contempt: action to make fine a lien on real estate: parties.

under which the action of *Cameron v. Frank Kapinos and Lena Kapinos* was brought provide that any citizen residing in the county where a liquor nuisance exists, may, after notice or information of such nuisance given to the county attorney, and neglect or refusal by him to bring suit, institute and prosecute, in the name of the state, an action in equity to enjoin the nuisance, or he may institute such an action in his own name. Chapter 143 of Acts of the Twentieth General Assembly; chapter 66 of Acts of the Twenty-first General Assembly. In either event it is held that the action so instituted is of a public nature, and for the public benefit. *Littleton v. Fritz*, 65 Iowa, 488, 495; *Apple-gate v. Winebrenner*, 66 Iowa, 67, 68; *Geyer v. Douglass*, 85 Iowa, 93. In *Conley v. Zerber*, 74 Iowa, 699, 700, it is held that the right thus conferred by statute upon the citizen is a mere naked right to maintain the action; that the citizen is permitted to maintain the action for the public benefit. In *Dickinson v. Eichorn*, 78 Iowa, 710, it is said that in such cases "the plaintiff, as a citizen of the county, stands for and represents the public." We have held that a proceeding in such cases to punish for a contempt is properly brought under the title of the equity case. *Manderscheid v. District Court of Plymouth Co.*, 69 Iowa, 240, 242. It follows, then, that in a proceeding to make the fine imposed in the contempt proceeding a lien upon real estate of one who knowingly permits her premises to be used in thus violating the law, and the order or mandate of the court, it is proper that the same person be the plaintiff as in the original equity action and in the contempt proceeding. This action is only a proceeding on behalf of the

state, by the citizen, to enforce the collection of the fine imposed in the contempt proceeding, and we see no reason for holding that he is not a proper party plaintiff.

II. The other ground of demurrer attacks the sufficiency of the petition. By the Acts of the Twenty-first General Assembly, chapter 66, section 12,  
2. —: —: it is provided:

“For all fines and costs assessed, or judgments rendered, of any kind against any person for any violation of the provisions of this chapter, or costs paid by the county on account of such violations, the personal and real property \* \* \* as well as the premises and property personal or real, occupied and used for the purpose, with the knowledge of the owner thereof, or his agent, by the person manufacturing or selling, or keeping with intent to sell intoxicating liquors contrary to law shall be liable, and all such fines, costs, and judgments shall be a lien on such real estate until paid.”

The petition alleges, in substance, that in the contempt proceedings it was charged that in making the sales for which Frank Kapinos was adjudged to be in contempt he acted as the agent of the defendant therein, and that said sales were made with her knowledge. As will be seen from the statement of facts, every fact necessary to fix the liability of the property of the defendant herein for the fine imposed in the contempt proceedings, as well as the costs thereof, is fully alleged.

Appellee urges that Lena Kapinos was not a party to the contempt proceedings, and hence she can not be bound thereby. This is not an action against her personally, but a proceeding authorized by the statute to make the fine and costs in the contempt proceeding a lien upon her real estate. Under the stringent and far-reaching provisions, above quoted, for all fines and

costs assessed, or judgments rendered, of any kind against any person for any violation of the law, the personal and real property used for such purpose with the knowledge of the owner of the property is made liable. See *De France v. Traverse*, 85 Iowa, 422; *Johnson v. Grimminger*, 83 Iowa, 10. The provisions of the statute can not be limited to cases only where it is sought to charge the property for a judgment recovered for an illegal sale of liquor upon the defendant's premises with her knowledge, but they reach as well a case like that at bar. Nor is it essential that Lena Kapinos should have been a party to the contempt proceeding. Counsel for appellee say: "This action is without a precedent in this country, and at best a monstrous innovation and attempted perversion of equity and justice." We have nothing to do with the policy of the law which authorizes this remedy for the enforcement of fines, costs and judgments in such cases. We must enforce the law as we find it. That the proceeding is clearly authorized by the statute we have no doubt, and the petition contained all the necessary allegations. The demurrer should have been overruled. **REVERSED.**

REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
SUPREME COURT  
OF  
THE STATE OF IOWA,  
AT  
DES MOINES, JANUARY TERM, A. D. 1894,  
AND IN THE FORTY-EIGHTH YEAR OF THE STATE.

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LOUIS MILLER, Appellee, v. ILLINOIS CENTRAL RAILWAY  
COMPANY, Appellant.

1. **Evidence:** ERROR CURED BY INSTRUCTIONS TO JURY. The admission of immaterial evidence will be deemed without prejudice where, under the instructions of the court, such evidence is excluded from the consideration of the jury.
2. **Railroad:** DEFECTIVE APPLIANCES: INJURY TO EMPLOYEE: CUSTOM: EVIDENCE. In an action by a brakeman to recover of a railroad company for injuries sustained through stepping upon a defective lid to the manhole of the water tank on the tender of an engine, while passing from the cab of the engine to the cars for the purpose of setting the brakes, as his duties required, *held*, that proof of the custom of brakemen, in going over the tender, to step on the lid of the manhole, might be shown by the testimony of witnesses as to what they would do under similar circumstances, and what was considered a safe course to pursue.

3. ———: ———: ———: ———. It is not competent, in such case, for the plaintiff to show that another brakeman had previously stepped upon the lid to the manhole on the same engine, with similar results.

*Appeal from Dubuque District Court.*—HON. JOHN J. NEY, Judge.

TUESDAY, JANUARY 16, 1894.

THE plaintiff was a brakeman on one of the defendant's railroad trains. He claims damages for a personal injury which he alleges he received by falling into what is called a "manhole" on the top of the tender of an engine. His right to recover damages is based on the claim that the defendant and its agents and employees were negligent in not properly adjusting the cover of said manhole, and that the lid or covering thereof was constructed in an unsafe and defective manner, and that the rim or top of said manhole was bent and out of repair. The answer was a general denial, and an averment that the injury, if any, was caused by the want of care and caution of the plaintiff, which directly contributed to the result. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Reversed.*

*Boies, Couch & Boies* and *W. J. Knight*, for appellant.

*Powers, Lacy & Brown*, for appellee.

ROTHROCK, J.—It appears from the evidence that the plaintiff was what is known as "head brakeman" on a freight train of the defendant, and, just before he received the injury of which he complains, he was riding in the cab of the engine. No question is made as to that being the proper place for him to ride when not employed at the brakes. The alleged injury was received in the night, as the train approached a station

called "Delaware Center," on its trip westward from the city of Dubuque. The plaintiff left his place in the cab, and went out over the tender, to get on the top of the cars, to attend to his duties while the train was approaching the station. The manhole is an opening in the tank part of the tender, and near the back part of it, into which the water spouts, at water stations, are placed to receive water in the tank, to make steam for the engine. This opening or hole is in the center of the tank, that is, it is equidistant from the sides of the tank. In crossing over the center of the tender and tank, the plaintiff stepped on the lid over the manhole, and, when he placed his weight on the lid, it did not sustain him, but slipped away, and turned up, and his leg went down, and was injured. This is the substance of the plaintiff's claim, as detailed by him in his testimony as a witness on the trial.

We have thus briefly stated the grounds upon which recovery is sought. If the plaintiff was in the line of his duty in taking the direction he did to get on top of the train, and in stepping on the covering of the manhole, and was not negligent in failing to discover that it was defective or out of position, he was entitled to recover, if the manhole was improperly or negligently covered, either by reason of the lid being improperly placed over the manhole, or because of the manhole being improperly constructed, or out of repair and in an unsafe condition. It would appear from this statement that the issues in the case were plain and unambiguous, and a review of the questions involved upon an appeal ought not to be attended with difficulty. But a great many questions were raised during the trial. Many of these question will be disposed of in a general way, without special mention of them. Such as we think require particular consideration will be set out.

I. There was evidence introduced by the plaintiff to the effect that the manhole in question and cover thereof were constructed in a different manner from those on other engines.

1. EVIDENCE: error cured by instructions to jury.

This evidence was objected to by the defendant, and complaint is made because the objection was overruled. Whatever may be said of the competency of this evidence, it was no prejudice, because the court instructed the jury, as to the construction of the engine, as follows: "There is no contention on the part of the plaintiff in this case that the engine and tender are not of good make and approved pattern, and evidence of these qualities was excluded by the court when offered by the defendant." And the court further instructed the jury as follows: "It is contended by the plaintiff that the fireman on the engine was negligent in not placing the covering back on the manhole when he took water, or that the company was negligent in not keeping the rim of the manhole in proper condition to receive the top, and keep it in place by means of arms or brackets that fitted inside the rim of the manhole and kept the cap in place." These instructions embraced all there was in the case when it was submitted to the jury. There was no question as to the proper construction of the manhole and the cover thereof. It is true that there was evidence to the effect that the lid of the manhole on some engines was attached to the manhole by hinges, and in some respects was different from others. In view of the fact that there was no real question that the engine upon which the plaintiff received his injury was of proper construction and approved pattern, evidence as to the construction of other engines was wholly immaterial, and should not have been introduced; but, as it was excluded by the instruction above set out, there was no prejudice to the defendant in this respect.

II. The plaintiff introduced a witness who testified that it was usual and customary for brakemen, in

2. RAILROAD: defective appliances: injury to employee: custom: evidence.

going over the tender, to step on the lid of the manhole. We do not understand counsel to object to this line of evidence.

It was surely proper for the plaintiff to show that he was in the line of his duty when he received the injury, and that he pursued the course usually adopted by men in that employment under similar circumstances. *Jeffrey v. K. & D. M. Railway Co.*, 56 Iowa, 546; *Whitsett v. Chi., R. I. & P. Railway Co.*, 67 Iowa, 150. The objection of the defendant is that the witness was allowed to state what he would do under the same circumstances, and what was considered a safe course to pursue. We need not set out the questions and answers to which objection is made. When the whole testimony of the witness is considered, the objections do not appear to be well taken. The questions and answers show that the witness did not give his own opinion of the proper course to pursue.

III. One Weald was called as a witness by the plaintiff. He testified that he was a freight brakeman, and that he remembered engine number 365, and of going out with that engine drawing the train quite often, and he stated that it was not his custom to step on the lid of the manhole, and that he did not know what the custom was. It does not appear from the abstract that the witness was cross-examined at that time. His testimony in chief was favorable to the defendant. This witness was afterward recalled by the defendant for further cross-examination, and the cross-examination and re-examination were as follows:

"When on the stand, you said in reply to a question by the gentleman on the other side as to whether it is the custom to step on the lid or cover of the manhole. and then step on the next car, that that is not the way you did it? A. Well, I done it once, and it caved

in. I thought I had better quit. I did not make that a practice. I don't think it is the practice or custom to do that on the Illinois Central." "Do you know what the custom was on the Illinois Central Railroad as to the brakemen stepping on the lid of the tank? (Objected to, as not proper cross-examination, improper, and incompetent.) By counsel for defendant to the court: This is merely a question that we omitted to ask the witness when he was on the stand before. (Objection sustained, and defendant duly excepts.)" Redirect examination by the plaintiff: "You testified that you stepped on this lid, and it caved in. What engine was that you did that on? (Objected to, as improper and incompetent,—'We asked him generally, and not as to this particular engine;' also, as irrelevant and immaterial. Objection overruled, and the defendant duly excepts.) A. It was on engine number 365."

We think the court should have sustained the motion to strike out the testimony of the witness, and that it was error to allow it to go to the jury. Engine number 365 was the one on which the plaintiff received his injury, and if the plaintiff had, in the examination in chief, sought to prove that another person had stepped on this manhole, and found it deficiently covered, it would have been error to admit the evidence. *Hudson v. Chi. & N. W. Railway Co.*, 59 Iowa, 581; *Bell v. Chi. B. & Q. Railway Co.*, 64 Iowa, 321; *Phillips v. Town of Willow*, 34 N. W. Rep. (Wis.) 731. As we understand it, the evidence drawn out by the defendant was strictly in the line of proper cross-examination. The re-examination, it is true, was directed to the same subject-matter as the cross-examination. We discover no reason why the defendant should be required to remain silent during the redirect examination, and allow incompetent evidence to be introduced, because counsel did not move to

exclude the statement of the witness that he "done it once, and it caved in." It was the right of the defendant to have all the evidence of this witness in reference to the engine upon which the plaintiff sustained his injury withdrawn from the consideration of the jury.

IV. As the judgment must be reversed for the error last above considered, it is proper to say, in view of a new trial, that the failure of the fireman to notify the plaintiff that the lid of the manhole was in an unsafe and dangerous condition is not a ground of negligence averred in the petition, and that question should not have been submitted to the jury. We do not intend to hold, however, that, with proper averments, the knowledge of the fireman, and his failure to communicate any defects in the manhole to the plaintiff, may not be evidence of negligence. There are no other grounds of complaint on the part of the appellant which appear to us to demand consideration. REVERSED.

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THE STATE OF IOWA, Appellee, v. C. A. BUXTON, Appellant.

1. **Practice: RE-EXAMINATION OF JURORS: DISCRETION OF COURT.** After a juror has once been examined and passed for cause, the allowance of a subsequent examination, upon a point overlooked by counsel in his first examination is a matter resting within the discretion of the court.
2. **Seduction: CHASTITY OF PROSECUTRIX: REFORMATION: INSTRUCTIONS TO JURY.** Where in a prosecution for seduction there was evidence of the previous unchaste character of the prosecutrix, and no evidence of reformation, *held*, that an instruction to the jury that, if they believed the evidence of the unchastity of the prosecutrix, then she was unchaste at the time of the alleged seduction, "unless she had reformed," was erroneous.
3. ———: **EVIDENCE OF PREPARATIONS FOR MARRIAGE.** Proof of preparations by the prosecutrix to marry the defendant in a criminal prosecution for seduction is inadmissible.

*Appeal from Jones District Court.*—HON. J. D. GIFFEN,  
Judge.

TUESDAY, JANUARY 16, 1894.

THE defendant was indicted, tried, and convicted of the crime of seduction, and judgment entered against him, from which he appeals.—*Reversed.*

*Welch & Welch*, for appellant.

*John Y. Stone*, Attorney General, and *Thomas A. Cheshire* for the state.

GIVEN, J.—I. In impaneling the jury, one Young was called as talesman, and, after examination, was passed for cause. Afterward, and after another juror had been examined and passed for cause, and another peremptory challenge made, the defendant asked leave to further examine Mr. Young for cause, to show that he had served in that court as talesman within one year, counsel stating that that “fact was overlooked in the examination for cause.” The court refused the leave asked, and thereupon the defendant challenged Mr. Young peremptorily, and thereafter exercised his only remaining peremptory challenge. The appellant assigns this refusal as error. It is conceded that it was within the discretion of the court whether to grant the leave asked. There is nothing appearing to show an abuse of that discretion, therefore the judgment can not be disturbed on this ground.

The appellant complains of certain rulings of the court sustaining objections to questions put by him to the witnesses. They are not questions that will necessarily arise upon a retrial, and, as we conclude that the case must be reversed, it is unnecessary that we consider those questions.

In the eighth paragraph of the charge, the court,

1. PRACTICE: re-examination of jurors; discretion of court.

after instructing that the prosecutrix was presumed to have had a previously chaste character, and that the burden was on the defendant to overcome this presumption, instructed as follows: "In this case there has been evidence offered tending to show that the prosecutrix, sometime prior to the time of the alleged seduction, had sexual intercourse with one Lee Wilbur; and, if you believe this, then she would be of unchaste character at the time of the alleged seduction by defendant, unless she had reformed, and then he could not be convicted." No evidence whatever was offered by the state with a view to establish reformation. The prosecution was upon the basis that the prosecutrix had always been of chaste character up to the time of the alleged seduction. While the instruction states the law correctly, we think it was inapplicable to this case, as there was no claim nor evidence of reformation.

III. Another error appearing in the record demands attention, though not assigned as error nor argued.

In criminal cases we are required to consider all errors appearing in the record.

2. —: evidence of preparations for marriage.

The prosecutrix having testified that she did get ready to marry the defendant; that she did up her sewing, and had everything ready; and that her sister stayed at home, and sewed steadily for her for a week, counsel for the defendant objected "to anything that she and her sister did, as being incompetent and immaterial," which objection was overruled. The objection is hardly as explicit and well-timed as it should have been, but the defendant fairly raises the question of the right of the state to prove preparations by the prosecutrix for marrying the defendant. In *State v. Lenihan*, 88 Iowa, 670, this court held that such evidence was not admissible in a prosecution of this kind.

For the errors pointed out, the judgment of the district court is REVERSED.

LAKE MANAWA RAILWAY COMPANY, Appellant, v. J. W.  
& E. L. SQUIRE *et al.*, Appellees.

**Contracts in Writing:** SUBSEQUENT CHANGE BY PAROL AGREEMENT: EVIDENCE. Where, in an action upon a written contract of subscription to stock, the plaintiff alleged, that said agreement was subsequently changed by writing thereon the word "donation," held, that the admission of parol evidence to show the agreement of the parties, whereby said subscription was changed to a donation, was not in violation of the rule excluding parol evidence to vary or contradict a written contract.

*Appeal from Pottawattamie District Court.*—HON. A. B. THORNELL, Judge.

TUESDAY, JANUARY 16, 1894.

ACTION to recover a donation for the construction of a railway. There was a verdict and judgment for the defendants, and the plaintiff appeals.—*Affirmed.*

*Emmet Tinley*, for appellant.

*Ross & Ross*, for appellees.

KINNE, J.—I. The defendants entered into the following written agreement:

"We, the undersigned subscribers hereto, in consideration of each other's subscription hereto made to the Lake Manawa Railway Company of Council Bluffs, Iowa, and other considerations to us moving, do each for himself subscribe for, and agree to pay for and to take, as provided in the articles of incorporation of said company, the number of shares and the amount of capital stock set opposite our respective names.

"Dated, March 21, 1887.

Name.	No. Shares.	Amount.
J. W. & E. L. Squire	5	\$500.00'

Suit was originally brought on the agreement as above written. Afterwards, by amendment, it was alleged that said stock subscription was changed to a donation, and that the above contract was changed by writing thereon the word "donation," and that no other modification or change was made in said contract. This word "donation" was written immediately to the right of the "\$500.00." The defendants plead, in substance, that the agreement touching the "donation" was partly by parol and partly in writing; that, at and prior to the time the defendants signed the foregoing agreement, it was verbally agreed and understood, by and between the defendants and the promoters of said railway enterprise and the officers of the plaintiff, that said railway should be constructed, operated, and maintained from the southern terminus of Ninth street, in the city of Council Bluffs, southward over and along the section line between sections eleven and twelve, in township seventy-four, range forty-four, to a point within six rods of the northeast corner of the northeast quarter of the northeast quarter of section number fourteen, township seventy-four, range forty-four, and to a place then known as "Wray's Landing," on Lake Manawa, which was a pleasure resort situated south of and near to said city of Council Bluffs; that the defendants owned a tract of land on said lake, and adjacent to said line of railway, which was valuable; that the consideration on which the defendants made their said subscription for stock was that said road should be constructed, operated, and maintained on the line aforesaid, which the plaintiff agreed to do; that the plaintiff did so construct and operate the road for a time, but afterward took up the track, and moved the road fifty rods to the east of its original location, thereby making it a much greater distance from said railway to the defendants' said land, and they say that the consideration on which said subscription was made has wholly failed; that,

prior to said change of the route of said railway, the defendants paid two hundred and fifty dollars under said agreement. In the sixth division of the answer, in addition to the foregoing averments, it is alleged that the plaintiff thereafter requested the defendants to make their subscription for stock a donation, and that the defendants did so upon the agreement of the plaintiff that it would construct, operate, and maintain said road upon the route as originally agreed upon with the defendants; that it did so for a time, and afterwards abandoned the same, and adopted a new line, as heretofore alleged, and damages are claimed therefor. The plaintiff filed a reply, admitting its incorporation, admitting "that the stock subscription was changed upon conditions set forth in said sixth paragraph of said answer to a donation," and denying all other allegations of the answer. The record also contains an agreement of the parties, which need not be set out, as in our view it does not affect their rights or liabilities. From a verdict and judgment for the defendants, the plaintiff prosecutes this appeal.

I. Evidence was introduced in the trial court, against the plaintiff's objection, to show that, at and prior to the time the defendants subscribed for the stock, the plaintiff's officers and agents verbally agreed with the defendants, as an inducement for them to take stock, to build, operate and maintain the road upon and over the route set out in the answer; that it was the consideration on which the defendants took the stock; and that the defendants afterwards, on the plaintiff's solicitation, changed said stock subscription to a donation, upon the verbal understanding and agreement that the road should be built, operated and maintained on the route originally agreed upon. At the close of the testimony, the plaintiff moved to strike out all the testimony of conversations had at the time the stock was subscribed, as well as when it was changed

to a donation, as tending to alter or change the written contract entered into between the parties. The motion was overruled. The same question was raised by objections to instructions given by the court. Many errors are assigned, but the only question argued is as to the admissibility of the evidence touching the parol representations, conversations, and statements aforesaid, and the correctness of the instructions to the jury on that branch of the case.

If this was an action to recover on the stock subscription, and there was no claim that some part of the contract rested in parol, it is clear that evidence of contemporaneous parol agreements would not be admissible. In this case, however, the original contract, which was in writing, and obligated the defendants to take a certain amount of stock in the plaintiff company, was abandoned by both parties, and a new agreement entered into in lieu of it. By this new arrangement, the defendants were released from all liability on the original contract, and a new liability created. They agreed to donate the five hundred dollars to the plaintiff. No writing was entered into touching the agreement save and except that the word "donation" was written by someone, it does not appear by whom, to the right of the figures "\$5,000.00" on the stock subscription paper. It seems to us that the agreement upon which the donation was in fact made does not appear from the paper itself; that in that respect it was incomplete. The writing being silent as to the agreement under which the donation was made, parol evidence was clearly admissible to show what that agreement in fact was. *Fawcner v. Wall Paper Co.*, 88 Iowa, 169, and cases cited. Now, the evidence admitted tended to show the circumstances and conditions surrounding the donation. It was not sought to defeat the written part of the contract by showing that no donation was made, but to establish the parol part of

the contract by showing what the agreement in fact was, or rather the terms and conditions upon which the donation was made. Then, as we understand this record, it is not a case of an attempt to change a complete written contract by proof of a parol contemporaneous agreement, but to show what the contract was, in so far as it was not reduced to writing. Such evidence has often been held admissible. See *Fawkner v. Wall Paper Co.*, 88 Iowa, 169.

Again, if the answer and counterclaim were objectionable as pleading a contemporaneous parol agreement to vary the terms of a written contract, as the appellant contends, advantage of that fact should have been taken by demurrer. On the contrary, issue was taken on the facts alleged in the answer and counterclaim, a reply was filed, in which it is admitted that said stock subscription was changed, upon conditions set forth in the answer, to a donation; and there was a denial that the defendants were injured by reason of the removal of the plaintiff's railway track. Under this condition of the pleadings, it would seem that the claim of the defendants, that the donation was made on condition that the road should be built, operated and maintained on the line contended for by them, should not have been a matter of controversy on the trial. If we treat the subsequent agreement for the donation as an agreement to change the original written contract, evidence of it is admissible. It is not of a contemporaneous parol agreement, but an agreement subsequently made. Parties may, by parol, rescind, alter, or abrogate a prior written contract. The case needs no further consideration. As we have said, the facts do not bring it within the rule prohibiting proof of a contemporaneous parol agreement, the effect of which is to alter or change a written contract. The instructions given were in harmony with the views we have expressed. **AFFIRMED.**

THE STATE OF IOWA, Appellee, v. JOSEPH ROW *et al.*,  
Appellants.

**Bail: FORFEITURE: DEFAULT AGAINST SURETIES.** Where, previous to the call of a defendant in a criminal cause for commitment to the penitentiary, following the determination of an appeal, he had been taken by the sheriff in another state, under a requisition, and surrendered at the penitentiary, and was thereby prevented from appearing in court, and his sureties from producing him, *held*, that it was error to declare a forfeiture of the defendant's supersedeas bond, and that a judgment thereon against the sureties should be set aside.

*Appeal from Boone District Court.*—HON. S. M.  
WEAVER, Judge.

TUESDAY, JANUARY 16, 1894.

IN FEBRUARY, 1888, the defendant, Joseph Row, was convicted in the district court of Boone county of the crime of manslaughter, and sentenced to five years' imprisonment in the penitentiary. From the judgment he appealed to this court, and filed his bond to supersede the judgment, and the other defendants in the case are the sureties on the bond. The cause was affirmed in this court on the fifteenth day of October, 1890, and a *procedendo* was on that day issued to the district court of Boone county, directing it to proceed in the same manner as if no appeal had been prosecuted in this court. The sheriff of Boone county, aided by a requisition from the governor of Iowa to the governor of Missouri, proceeded to that state, where the defendant Row was found; and he was taken by said sheriff, and delivered, on the twenty-fourth day of October, 1890, to the warden of the penitentiary at Ft. Madison, Iowa, in execution of the judgment of imprisonment against him. On the third day of November, 1890, at a term of the district court of Boone county, it appears

that Joseph Row was called, and failed to appear, and thereupon the appearance bond was produced, and the sureties thereon were called, and failing to appear and to produce the said Joseph Row, the bond was declared forfeited. On the fifth day of November, 1890, the sureties on the bond appeared and filed a motion to set aside the default entered against them on the ground that, when it was entered, the said Row was in the penitentiary of the state in execution of the judgment. The district court overruled the motion, and the defendants appealed.—*Reversed.*

*C. C. Cole*, for appellants.

*J. R. Whitaker*, County Attorney, and *John Y. Stone*, Attorney General, for the State.

GRANGER, C. J.—The following is the record of the district court, declaring the forfeiture:

“*State of Iowa v. Joseph Row.* Be it remembered that on this third day of November, 1890, the above cause coming on for hearing on the motion of plaintiff for forfeiture of the appearance bond of the defendant Joseph Row, and, it appearing to the court that the judgment against the defendant Joseph Row has been affirmed by the supreme court of Iowa, and that the defendant Joseph Row was required by this court, that the sentence and judgment of said court might be executed and performed, and the said Joseph Row was called and failed to appear, and no person for him, and his appearance bond was produced, and said Joseph Row and the sureties on his bond, to wit, C. H. Ward, J. R. Hurlburt, A. H. Miles, and M. W. Ward, were called in open court, and failing to appear and to produce the said Joseph Row, the said appearance and undertaking to appear is hereby ordered, adjudged, and declared to be forfeited and in default.” The undertaking of the bond is that “in case the said J. A.

Row shall well and truly pay the said fine, or such part of it as the supreme court may direct, and if the said J. A. Row shall surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgments of the supreme court, then this bond to be void; otherwise, to be and remain in full force and effect." The default shown in the record is not a failure to make payment, but it is for want of the personal appearance of Joseph Row, "that the judgment of the court might be executed and performed."

The default as to the sureties is for not producing him. The situation, then, is this: The default was taken November 3, 1890. Nine days before that, the sheriff of Boone county had surrendered him at the penitentiary, and he was, at the time the default was taken, doing precisely the thing for which the district court desired his presence. He was called that he might be committed to the penitentiary. The court, through its processes, had already so committed him. It is not to be said, as a legal conclusion, that, had he not been imprisoned at the instance of the state, he would neither have appeared, nor his sureties produced him, when his appearance was called for. The state, by placing him in the penitentiary, had rendered it absolutely impossible for him to appear, or for the sureties on his bond to produce him. Under such circumstances there could be no default. It appears, from an affidavit to the motion to set aside the default, that one of the sureties had sent an agent to Missouri to secure and return Row to the state, to avoid default on his bond, and Row was in the custody of such agent when the sheriff from Boone county arrived, and took him into custody, and afterwards delivered him at the penitentiary. It further appears that the sheriff was appointed as agent, under a requisition from the governor, at the request of one of the sureties on the bond.

It is said that the judgment was an imprisonment for five years, and payment of the costs of prosecution, and that the costs have not been paid. But the default is not for such a failure. The record makes no disclosures as to a default in the payment of costs. In our judgment the motion to set aside the default should have been sustained, and the order of the court overruling it is REVERSED.

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THE STATE OF IOWA, Appellee, v. JAMES O. DOOLEY,  
Appellant.

1. **JURORS: EXAMINATION OF: PEREMPTORY CHALLENGE.** In view of the provisions of section 2, of chapter 165, of Acts of the Seventeenth General Assembly, as amended by section 2, of chapter 2, of Acts of the Eighteenth General Assembly, requiring the jury upon the trial of an indictment for murder, if they find the defendant guilty of murder in the first degree, to designate in their verdict whether he shall be punished by death or imprisonment for life in the penitentiary, the state may properly be permitted, upon the impaneling of the jury, to inquire of the individual jurors, for the purpose of peremptory challenge, whether they have any conscientious scruples against the infliction of the death penalty.
2. **MURDER: EVIDENCE OF SIMULTANEOUS ASSAULT UPON ANOTHER.** The defendant was indicted for the murder of a girl ten years of age, whose body was found with that of her mother, who had also been murdered, lying upon a bed at their residence, the mother's underclothing bearing evidence of an assault. *Held*, that the state was entitled to show in connection with the situation of the body of the child, the condition of the body of the mother when found, and of the clothing upon it, in order that the connection of the defendant with the crime of which he was accused, the circumstances under which it was committed, and the motives which prompted it, might be more fully understood.
3. **—: INDICTMENT: SUFFICIENCY.** An indictment charging that the defendant willfully and feloniously, deliberately, premeditatedly and of his malice aforethought, did commit an assault with deadly weapons, upon the body of a person named, and with specific intent to kill and murder such person, did willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, strike and beat said person upon the head and body with an unknown weapon, and did shoot off and discharge the contents of a pistol into the head and body of said person, thereby willfully, feloniously, deliberately, premed-

89	584
91	170
91	502
89	584
119	252
119	466
89	584
4121	636

itately, and, of his malice aforethought, inflicting upon the head and body of said person a mortal wound, of which she died, and which charges that said acts were committed by "lying in wait," sufficiently charges murder in the first degree.

4. ———: INSTRUCTIONS TO JURY: CONSTRUCTION. An instruction in such case that before the defendant could be convicted "of the crime charged in the indictment" the state must prove certain facts specified beyond a reasonable doubt, is not objectionable as referring the jury to the indictment for information in regard to the offense charged.
5. ———: ———: LAW AS TO PARDONS. Upon the trial of an indictment for murder in the first degree the accused is not entitled to have the jury instructed in regard to the law of pardons applicable to persons convicted of such offense.
6. ———: SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT. The defendant resided on a farm with his uncle, who, on the day of the murder, had left home early in the morning, leaving his wife and daughter, a girl of ten years, and the defendant on the farm. From a confession made by the defendant to the reporter of a newspaper, it appeared that, after his uncle's departure, the defendant was scolded by his aunt for allowing the cattle to get into a neighbor's field, at which he became angry, and went to town and purchased a revolver. At the dinner table his aunt again scolded him for neglecting the cattle, and they quarreled for some minutes. After dinner, his aunt having begun again to scold him, the defendant took a padlock from his pocket, which he had picked up in the yard, struck his aunt twice with it on the head, knocking her down, and then shot her. Afterward the little girl, for the murder of whom the defendant was indicted, came running in from the barn, and, as she passed through the door the defendant struck her on the head with the padlock, knocked her down, and then shot her in the forehead. Having placed the bodies on the bed, the defendant took a satchel, with clothing, locked the house, harnessed a team to a buggy, and drove away. The defendant claimed that he purchased the revolver to practice with, and at the time had no intention of shooting any one, and that he had not felt any improper desires towards his aunt nor his cousin. The confession contained many statements shown to be false, and it was uncertain how much of it was true, but the defendant admitted the unlawful killing of his cousin upon the trial, and, taking the confession with other evidence in the case, the jury were warranted in finding the facts substantially as above stated. Held, that a verdict of murder in the first degree was supported by the evidence.
7. ———: PUNISHMENT FIXED BY VERDICT: CHANGE ON APPEAL. The defendant was only sixteen years old at the time of the murder, and previous to that time had been a quiet, well behaved boy, favorably

regarded by those who knew him, and there was no evidence, except the crimes in question, that he was of a depraved nature, though inferior in average development to other boys of his age. *Held*, that the punishment of death, as fixed by the verdict of the jury, being authorized by the evidence, the above facts as to the character of the defendant were not sufficient to warrant the interference of the supreme court in changing the punishment to be inflicted.

*Appeal from Adams District Court.*—HON. H. M. TOWNER, Judge.

TUESDAY, JANUARY 16, 1894.

THE defendant was charged by indictment with the crime of murder, was tried by jury, found guilty of murder in the first degree, and the punishment designated in the verdict was death. From the judgment rendered on the verdict, fixing the date of his execution on the sixteenth day of June, 1893, the defendant appeals.—*Affirmed*.

*Dale & Brown*, for appellant.

*John Y. Stone*, Attorney General, and *Thomas A. Cheshire*, for the state.

ROBINSON, J.—At about 7 o'clock in the morning of May 11, 1892, W. H. Coons, went from his home, which was between one half and three quarters of a mile southwest of the town of Prescott, leaving there his wife, Lucinda; his daughter, Nellie, ten years of age; and his nephew, the defendant, sixteen years of age. At 5 o'clock in the afternoon of the next day, he returned, and found the house closed and locked. He succeeded in entering it, and found lying on a bed the lifeless bodies of his wife and daughter. They had been murdered, and appearances indicated that they had been dead from twenty-four to thirty-six hours when their bodies were found. The underclothing of the mother was in such disorder as to indicate that an assault before the murder may have been attempted. The nephew was absent and had taken a

team, buggy, and some clothing, and other articles, which he did not own. Late in the evening of the twelfth day of May, he was arrested in Villisca. His indictment and conviction were for the murder of his cousin, Nellie Coons.

I. Section 2 of chapter 165 of the Acts of the Seventeenth General Assembly, as amended by section 2 of chapter 2 of the Acts of the Eighteenth General Assembly contain the following: "Upon the trial of an indictment for murder the jury, if they find the defendant guilty of murder in the first degree, must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor in the penitentiary." During the impaneling of the trial jury the state was permitted to ask certain persons, who were retained as members of the jury, whether they had any conscientious scruples against the infliction of the death penalty. The defendant objected to the questions as "incompetent, immaterial, and irrelevant, and not a statutory ground for challenge." The objections were overruled, and of that ruling the appellant complains. The questions were not allowed on the theory that the answer might disclose ground for challenge for cause, and much that is said in argument, and most of the authorities cited by appellant on that point, are wholly irrelevant to the question presented. He does not deny that peremptory challenge may be made by the state and by the defendant without the assignment of any cause, but insists that the right to examine persons called to act as jurors in regard to their qualifications is limited to the statutory grounds for challenges for cause. Section 4407 of the Code, relied upon by appellant to sustain his claims, is as follows: "4407. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every

1. JURORS: examination of:  
peremptory challenge.

question pertinent to the inquiry thereon, but his answers shall not afterward be testimony against him." That section refers exclusively to challenges for cause, and has no relation to peremptory challenges. It is the general and well established practice to allow both to the state and to the defendant considerable latitude in the examination of persons called to act as jurors, not only to facilitate the discovery of grounds for challenge for cause, but to enable the parties interested to discover any peculiarity or conduct, association, character, or opinion, or any predilection, of the person under examination, or other circumstances which, in the opinion of the examiner, might influence the person as a juror, and affect his verdict. It is well known to persons familiar with jury trials that jurors are frequently influenced in reaching a verdict by considerations which have no legitimate application in the case. The right of peremptory challenge gives the means of keeping from the jury persons of that kind, which the challenge for cause does not afford, and parties should be permitted to examine persons called to act as jurors, within reasonable limits, to the end that the peremptory challenges may be used intelligently. It was the privilege of the state to exclude from the jury, so far as its right to peremptory challenges extended, all persons who were prejudiced against the infliction of the death penalty; and it was not an abuse of the right of examination to permit inquiry as to the views of the persons summoned as jurors on that point. The objections to questions under consideration were, therefore, properly overruled.

II. The appellant complains that the state was permitted to prove, not only the condition in which the body of Nellie Coons was found, but also the condition of the body of her mother, and of the clothing upon it, on the ground that the effect of permitting such evidence

2. MURDER: evidence of simultaneous assault upon another.

to be introduced was to put him upon trial for an assault upon the mother, and the murder of both the mother and child. We do not think the complaint is well founded. The state was entitled to show the condition in which the body of the child was found, and its surroundings, and, incidentally, that of the mother, in order that the connection of the defendant with the crime of which he was accused, the circumstances under which it was committed, and the motives which prompted it, might be more fully understood; and the fact that, in proving those matters, another crime would necessarily be shown, did not affect the right of the state to introduce the evidence in question.

III. The evidence shows that there were two wounds on the head of Nellie Coons, one on the back of it, caused by a blow with some instrument, and a pistol-shot wound in the forehead, and that the latter probably caused her death. The appellant contends that the indictment does not sufficiently charge murder in the first degree, committed by the pistol shot, in that it does not allege that the shot was fired willfully, and with deliberation, premeditation, malice aforethought, and intent to kill. The indictment contains two counts. The first one charges that the defendant, at the time and place stated, "in and upon the body of one Nellie Coons, then and there being, willfully and feloniously, deliberately, premeditatedly, and of his malice aforethought, did commit an assault with deadly weapons, being a deadly weapon, the particular description of which is to the grand jury unknown, and a pistol then and there held in the hands of the said James O. Dooley, and loaded with powder and bullet, and then and there the said James O. Dooley did, with the specific intent to kill and murder the said Nellie Coons, willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, strike and beat the said

s. —: indictment: sufficiency.

Nellie Coons, upon her, the said Nellie Coons', head and body, with the said unknown weapon, and did shoot off and discharge the contents of the said pistol at, against, into, and through the head and body of the said Nellie Coons, thereby, willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, inflicting upon the head and body of the said Nellie Coons a mortal wound, of which said mortal wound the said Nellie Coons then and there did die." The second count charges the offense in the same language, with the addition that it was committed "by lying in wait." We think the indictment not only sufficiently, but very clearly, charges that both wounds were inflicted willfully, feloniously, deliberately, and with premeditation. No other interpretation can be given to all the language used in either count, when considered together.

IV. The appellant claims that the court, in its charge, erroneously referred the jury to the indictment for information in regard to the offense charged. In some paragraphs of the charge the court referred to the indictment, as by stating that before the defendant could be convicted of the crime charged in the indictment the state must prove specified facts beyond a reasonable doubt, but the jury were not told to examine the indictment. On the contrary, they were told, in the language of the court, what it charged. The charge is not vulnerable to the objections made.

V. The appellant complains that the court refused to instruct the jury in regard to the law of pardons applicable to persons convicted of murder in the first degree. We think the action of the court in that respect was correct. The guilt of the defendant did not depend upon the means provided by law for escaping punishment, nor do we think that was a matter to be considered by the

4. —: instructions to jury: construction.

5. —: —: law as to pardons.

jury in designating the punishment. That should be determined from the crime proven, and the circumstances of aggravation, the apparent necessity for an example to deter other wrongdoers, and considerations of that nature, and not from the difficulty of obtaining a pardon.

VI. Counsel for appellant have discussed at considerable length many questions founded upon the record, which we do not deem it best to notice specifically. They are, in the main, in the nature of verbal criticisms of the charge, and do not reach to the merits of the case. Of the objections thus presented, it is only necessary to say that they are not well grounded, or, at most, relate to technical errors, which do not affect any substantial rights, and which we are required to disregard. Code, section 4538.

There can be no reasonable doubt that defendant is guilty of the crime of which he was convicted. He commenced to work for his uncle in September, 1891, and worked for him continuously until the time of the murder, excepting some time during the winter, when he attended the Prescott school. In the morning of May 11, after his uncle left home, his aunt scolded him for permitting the cattle to get into a neighbor's field, which made him angry. At about 10 o'clock he went to Prescott, and, while there, wrote an order on a merchant of the town, to which he signed a name intended to be that of his uncle, and with it went to a hardware store, where he inquired for revolvers. He was shown one which he agreed to take, if the merchant would accept the order. The order was accepted, and the defendant carried away with him the revolver and a box of cartridges. He states that he purchased the revolver to practice with, and at the time had no intention of shooting anyone; that he had half a pint of whisky with him, which he and another person

6. —: sufficiency of evidence to support verdict.

drank, and that he went home about noon; that his aunt was usually kind to him, and that he had not felt any improper desires towards her or his cousin, but when he reached home the cattle were in a neighbor's field. Mrs. Coons scolded him at the dinner table for neglecting the cattle, and they quarreled for some minutes. After dinner, about half past 12 o'clock, she again began scolding him. He had in his pocket a padlock, which he had picked up in the yard for the purpose of unlocking it, but when Mrs. Coons scolded him he became angry, and struck her on the head twice with it. The blows knocked her down. They struggled for a time, and he then shot her. The little girl came running in from the barn, and as she came through the door he struck her on the head with the padlock, and knocked her down; then shot her in the forehead. He placed the bodies on the bed, took a sachel, with clothing, locked the house, harnessed the team to a buggy, and drove away. He further says that he did not recover from his passion sufficiently to realize the enormity of what he had done until he had driven four or five miles. The so-called "confession" was prepared for publication in a newspaper by one of its reporters, and, on the objection of the defendant, it was excluded when offered in evidence; but the objections were withdrawn, and the confession was read. It contains some statements which are shown to be false. One is that he fired seven or more shots into the body of his aunt. A pool of blood outside of the house indicates that one of the persons murdered fell there. The inaccurate statements in the confession are so numerous that it is uncertain how much of it is true. The jury were authorized to give it such credit as it seemed to deserve, rejecting some portions, and accepting others, as they seemed warranted in doing. But we think they were justified in finding, from the confession and other evidence in the case,

that the facts were substantially as we have stated them. The defendant admitted in open court that he was guilty of the unlawful killing of Nellie Coons.

It is said that there is no evidence that it was done by lying in wait. But we think the jury may have found, from the circumstances connected with the killing of the mother, the fact that the child was at the barn when her mother was killed, the evident desire of the defendant to effect at least a temporary concealment of the crime, and the further fact that the child was killed at the house, that the murder of the latter was accomplished by means of lying in wait, within the meaning of the law.

VII. Counsel for appellant discuss at some length the character of the defendant, as shown by his history. His father died when he was but a few years old. His mother remarried, and he left home when he was about thirteen years of age, and worked at different places until he commenced working for his uncle. He seems to have been a quiet, well behaved boy, who was favorably regarded by those who knew him. He attended school in Prescott a portion of the winter preceding the murder, and during that winter joined a church, and attended Sunday school. He was not an apt pupil, and his mental development, from lack of opportunity or of natural ability, seemed to be a little inferior to the average development of boys of his age. He is described as having the appearance of an easy going, sluggish fellow, who did not have the perseverance boys of his age and opportunities usually have. He had not drank much intoxicating liquor, but was quite a reader of cheap, sensational novels. After committing the murders, he drove out of town, and stopped for the night only about seven miles away. The next day he drove to Villisca, twenty-five miles from Prescott, placed the team he drove in a

7. —: punish-  
ment fixed by  
verdict:  
change on  
appeal.

stable, and that evening went to the home of a nephew of Mrs. Coons, and was given a bed for the night. He was there when a dispatch was received by that nephew, notifying him of the death of his aunt and cousin, and a short time afterward was arrested. There is nothing in the record, excepting the commission of the crimes which were proven, to show that defendant is of a depraved nature. Certainly, he can not be regarded as a hardened criminal, although guilty of a crime having few parallels in wanton atrocity in the history of the state. In view of the youth of the defendant, his lack of mental development, and his almost uniformly good conduct before the crime was committed, we should have been better satisfied had the jury designated imprisonment in the penitentiary for life as his punishment; but, in a legal sense, the evidence was sufficient to authorize the punishment designated, and there is no sufficient ground upon which we can prevent it.

We find no error in the record prejudicial to the defendant, and the judgment of the district court is AFFIRMED.

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THE STATE OF IOWA, Appellant, v. J. H. JOHNSON  
*et al.*, Appellees.

**Unlawful Assembly: INJURY TO BUILDING: CONSTRUCTION OF STATUTE.** Where persons assembled primarily for the purpose of driving away or frightening certain employees at a railway station, but, while so assembled, threw coal around the waiting room, and against the walls, forced open the door of the private office, and broke the lock thereof, *held*, that they were guilty of riotously assembling together to injure a building, within the meaning of section 4070 of the Code.

*Appeal from Mahaska District Court.*—HON. A. R. DEWEY, Judge.

WEDNESDAY, JANUARY 17, 1894.

J. H. JOHNSON, Phil Davis, Fred Coryell and Dick Wires were charged by indictment with riotously assembling together to injure a building. They demanded separate trials, and the state elected first to try Davis. A jury was accordingly impaneled, and the trial was commenced. After the evidence on the part of the state had been submitted, a motion to direct a verdict for the defendant Davis was sustained, and judgment was rendered in his favor. The state , appeals.—*Reversed.*

*Byron W. Preston*, for the State.

No appearance for appellee.

ROBINSON, J.—The defendants were indicted under section 4070 of the Code, and an appeal was taken by the state, for the purpose of obtaining an interpretation of the section for use in the further prosecution of the case against the defendants not yet tried. The portions of the section specified which are material to a determination of the appeal are as follows:

“Section 4070. If any person or persons unlawfully or riotously assembled, \* \* \* injure \* \* \* any dwelling house or other building \* \* \* he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year. \* \* \*”

The evidence shows that the defendant Johnson had been the agent and telegraph operator of the Chicago, Rock Island & Pacific Railway Company, at its station in the town of Leighton, but, at the time of the occurrence in controversy, he was out on a strike. In the evening of December 23, he was seen in Des Moines, where he was heard to say, in effect, that he was going to Leighton, and get the miners drunk, and

have them take the agent. In the evening of December 25 a crowd of fifteen or twenty persons gathered at the depot in Leighton, where many of them remained several hours. Some, if not all, of them were intoxicated, and their conduct was of a disorderly and riotous character. They indulged in much threatening, profane, and obscene language; threw coal around the waiting room, and against the walls; and the door of the private office was forced, and the lock on it broken. Their conduct was such that people who were there to take a train left before it came. The demonstrations of the crowd were directed chiefly towards the man who had taken Johnson's place, and toward other railroad employees who were with him, and no doubt were prompted by friendship for Johnson, and enmity for the man who had succeeded him. The appellee, Davis, was one of the crowd, and took an active part in what was done. There can be no doubt that the assembly was unlawful and riotous, and that it injured the building of the railway company.

The motion which was sustained by the court was as follows:

"The defendant now moves the court to instruct the jury to return a verdict for the defendant, for the reason that under section 4070 of the Code, under which this indictment is found, the evidence does not warrant a conviction; *second*, for the reason that the evidence is not sufficient to warrant a conviction of the defendant; *third*, for the reason that the evidence shows that the defendant is not guilty of the crime charged; *fourth*, for the reason that the evidence shows that the defendant was not attempting to destroy or injure the building; that he was not attempting to injure or destroy the building, together with other persons."

The fact that the purpose of the men who formed the assembly was primarily to drive off or frighten the

railway employees, and not to injure the building, is not important in fixing their guilt of the offense charged. If they had assembled for a lawful purpose, but, while so assembled, formed the purpose of doing an unlawful act, and, while in that condition, injured the railway building, the assembly was unlawful, and persons composing it were guilty of the statutory offense in question; and the same would be true in the case of a riotous assembly. The section under consideration is not intended to punish the unlawful or riotous assembly. That is provided for by section 4066, which makes it unlawful for three or more persons to assemble together in a violent or tumultuous manner to do an unlawful act. The evidence submitted showed that an offense defined by section 4070 had been committed, and that the defendant Davis, with others, was guilty of it.

It follows that the motion to direct a verdict should have been overruled. REVERSED.

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MARSHALL FIELD & COMPANY, Appellant, v. T. R.  
WALLACE *et al.*, Appellees.

1. **Clerk of District Court: APPROVAL OF BONDS: EVIDENCE OF CARE.** In an action against the clerk of the district court for negligently approving an insufficient administrator's bond, evidence of inquiries, made by the clerk, of business men in the community and of information received, before approving the bond, as to the extent and value of the estate of the deceased, and of the financial standing of the firm of which he was a member when he died, is admissible for the purpose of showing the degree of care and diligence exercised.
2. ———: ———: ———. But evidence of the manner in which the administrator and his sureties lived subsequent to the approval of the bond is not relevant.
3. ———: ———: **SECURITY REQUIRED ONLY FOR ACTUAL VALUE OF PROPERTY.** Where an administrator gives a bond in a penal sum exceeding the value of property coming into his hands, the clerk of the district court will not be liable for his approval of sureties who were insufficient for the amount of such bond, if they were at the time sufficient for a bond of the amount required by law, according to the real value of the property received by the administrator.

*Appeal from Cass District Court.*—HON. WALTER I. SMITH, Judge.

WEDNESDAY, JANUARY 17, 1894.

THE plaintiff, a creditor of the estate of Jesse L. Jones, deceased, brings this action upon the official bond of the defendant, T. R. Wallace, as clerk of the district and circuit courts of Cass county, to recover of the defendant Wallace as principal, and the other defendants as sureties, the amount due to the plaintiff from said estate, upon the ground that the defendant Wallace was, as such clerk, guilty of negligence in approving the bond of the administrators of said estate, to the injury of the plaintiff. The case was tried to a jury, resulting in a verdict and judgment for the defendants. The plaintiff appeals.—*Reversed.*

*L. L. De Lano* and *Willard & Willard*, for appellant.

*H. G. Curtis*, for appellees.

GIVEN, J.—The record shows, without dispute, that Jesse L. Jones and H. F. Ketchum were partners in a mercantile business under the firm name of Jones & Ketchum, prior and up to the time of the death of Mr. Jones, who died intestate. Soon after his death, Mrs. Minerva C. Jones, his widow, filed a petition for the appointment of administrators, stating the probable value of the personal estate to be twelve thousand dollars, and asking the appointment of Charles C. Jones, a son of the decedent, and H. F. Ketchum, the surviving partner as administrators. The defendant Wallace, as clerk, fixed the amount of the bond at twenty-four thousand dollars, and accepted as sureties Mrs. Jones, the widow, Phoebe C. Ketchum, wife of H. F. Ketchum, and daughter of deceased, and M. Bella

Jones and Alice Aylesworth, also daughters of deceased, and issued letters of administration to said Charles C. Jones and H. F. Ketchum.

At the time of the decease of Mr. Jones the firm was indebted for merchandise to the plaintiff, to Carson, Pirie, Scott & Co., John V. Farwell & Co., and E. S. Jaffrey & Co., each of which claims were duly filed, approved and allowed, and have since been assigned to the plaintiff. The inventory shows that the only assets that came into the hands of the administrators were the cash on hand, book accounts, merchandise and store fixtures belonging to the firm. A life insurance policy was included, which belonged to the widow, and is not claimed to be assets, and will not be further noticed. The administrators reported the assets sold in accordance with the order of the court, and that three thousand, four hundred and seventy-nine dollars and twenty-five cents of the proceeds remained after paying funeral expenses, allowance to the widow, and other approved expenses. They also reported seven thousand, four hundred and thirty-eight dollars and ninety-four cents of the claims of the third class allowed, three thousand, six hundred and thirteen dollars and four cents of which were firm debts. They asked an order to pay forty cents on the dollar. The only evidence of any action taken upon this request was an indorsement in pencil on the back of the report, signed by the judge, as follows: "App. order to make payment of dividend of forty per cent." The creditors moved the court for an order that, as said funds in the hands of the administrators were derived from partnership assets, they be first applied in payment of partnership debts. And the administrators moved for a *nunc pro tunc* order correcting the record so as to show that they were authorized to pay forty per cent., as asked in their report. Upon full hearing, the motion of the administrators was overruled, and it was adjudged that of said fund they

pay to Carson, Pirie, Scott & Company, and to John V. Farwell & Company, in addition to the forty per cent. already paid them, fifty-four per cent. of the total amount of their claims, and to E. S. Jaffrey and Company and to Marshall Field & Company, ninety-four per cent. of the amount of their claims. The administrators failed to comply with this order, probably because they had previously exhausted the fund in paying forty per cent. upon all claims of the third class, regardless of whether or not they were firm debts. The estate being exhausted, and the administrators and their sureties insolvent and nonresidents of the state, the plaintiff is unable to force collection of its claims against them. It is evident that these sureties were insufficient at the time they were accepted and approved by the defendant Wallace, and the controlling contention is whether, in accepting and approving said sureties, he acted with the care and diligence which the law required.

The law, section 2362 of the Code, having vested clerks of the courts with power to approve, or disapprove, the bonds of administrators and executors, it is required that they exercise reasonable care and diligence in the performance of that duty. In performing that duty they must not only act in the light of the extent and value of the estate, but also for the protection of creditors, and those entitled to distribution of the estate. The care and diligence which they are required to exercise are those which ordinarily careful and prudent persons would exercise in transactions of like importance.

On the trial the defendant, Wallace, was called in his own behalf, to testify to the inquiries he had made, and information that he had received, before approving the bond. He was permitted to testify, over the plaintiff's objections, to the estimate put upon the property of the deceased by the bankers with whom the deceased

1. Clerk of district court: approval of bonds: evidence of care.

did business. He was also permitted to prove by a number of business men who were in a position to know the fact, what the reputed financial standing of Jones & Ketchum and Jesse L. Jones was at the time of Mr. Jones' death. It will be observed that one of the administrators and three of the sureties were heirs of the deceased, and that the other surety was his widow. While the clerk was properly governed by the statement of the value of the assets made in the petition in fixing the amount of the bond, it was certainly proper for him, in determining as to the sufficiency of these sureties, to inquire further as to the probable extent of the estate and the interest of the sureties therein. The extent of the estate and their interest therein was one element from which to determine their solvency. While the clerk might not be excused for acting alone upon the reputed financial standing of the firm and of the deceased, it was certainly proper matter to be considered by him. We think there was no error in admitting either of these items of evidence.

II. Mr. Wallace was also permitted to testify, over the plaintiff's objection, as to the style in which C. C. Jones and his mother and sisters lived at the times long after the approval of the bond. It might be questioned whether evidence as to the manner of their living, at and before the approval of the bond, was admissible. It is certainly clear that their style of living, several years after, could not have governed the defendant Wallace in the approval of the bond, and was not sufficiently specific to show their financial condition when the bond was given, nor that the plaintiff could have collected the claims in question from them. That they lived in high style and expensively does not necessarily indicate that collection could have been enforced against them. We think it was error to have admitted this evidence, and that its admission was prejudicial to the plaintiff.

III. The appellant complains of the refusal to strike from the answer an allegation that the defendant Wallace, "in good faith, and in the exercise of his judgment as clerk, believed that said sureties were amply good," etc. It is true that such belief is not a defense; but this allegation, taken in connection with what precedes it, was evidently not intended to plead good faith as a defense. With the seventh paragraph of the charge before them, the jury could not have understood that good faith alone was a defense. When the part of the answer complained of is considered in connection with the other allegations in the paragraph, we think there was no error in refusing to strike it.

IV. It will be noticed that the estate proved to be of much less value than that stated in the petition for the appointment of the administrators.

2. —: —: security required only for actual value of property.

The court instructed as follows: "The bond taken of these administrators in this case was for twenty-four thousand dollars; but that bond was excessive, and the sureties thereon were sufficient, if they were at that time sufficient upon a bond large enough to secure the estate for the amount of property which is shown to have come into the hands of the administrators, to wit, four thousand, nine hundred and eleven dollars and sixty cents."

The appellant complains of this instruction, and contends that the defendants are liable, if the defendant Wallace did not exercise reasonable care in taking sureties for the amount named in the bond, even though they might be sufficient for the lesser amount. The lesser amount is all that came into the hands of the administrators, and all to which the plaintiff has a right to look for the payment of the claims in question, and, unless the negligence of the clerk has defeated the plaintiff in its recovery from that fund, his action has been without prejudice to the plaintiff. We conclude that, under the facts of the case, the instruction was without prejudice to the plaintiff, and is correct.

V. The appellant contends that the evidence shows, without conflict, that the defendant Wallace did not exercise reasonable diligence and care in approving the bond, and that, therefore, the court should declare, as a matter of law, that he is liable. The appellees contend that there is evidence from which the jury might find due care, and that, therefore, the question was properly submitted to the jury. We have not set out nor discussed the evidence on this question, as, for the error in admitting evidence, the judgment of the district court must be reversed. It is sufficient to say that we think the question was properly left to the jury.

VI. The appellees, while conceding that they can not take advantage of errors against them, nor ask affirmative relief, they not having appealed, contend that the plaintiff has shown no cause of action; that it appears that the plaintiff should not recover, and, therefore, a new trial should not be granted, even though erroneous instructions or rulings were made and given, as complained of by the appellant. Conceding the rule to be as claimed, which we do not determine, yet we are of the opinion that this case does not come within such a rule.

Our conclusion upon the whole record is that, for the reasons stated, the judgment of the district court must be REVERSED.

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NELLIE SMITH, Appellee, v. W. J. HARRINGTON *et al.*,  
Appellants; SAME v. TED KINNEY *et al.*, Appel-  
lants; SAME v. JOSEPH VOTREMBEK *et al.*, Appel-  
lants.

1. **Appeal:** REVIEW OF ORDER ON MOTION: RECORD. An order of the district court will not be reviewed by the supreme court where it appears that the evidence presented in the district court has not been preserved.

2. **District Court Rules: COPIES OF PLEADINGS: DISCRETION OF COURT.** Whether a pleading shall be stricken from the files because of the failure to file a plain copy thereof, as required by the rules of the district court, is a matter within the discretion of that court, and where, pending a motion to strike a petition because the copy thereof on file is blurred and illegible, the plaintiff filed a plain copy thereof, which filing was long before the trial, and the defendant was not prejudiced because of the character of the first copy, *held*, that the motion to strike was properly overruled.

*Appeal from Crawford District Court.*—HON. C. D. GOLDSMITH, Judge.

WEDNESDAY, JANUARY 17, 1894.

*R. Shawvan and E. R. Duffie*, for appellants.

*J. P. Connor*, for appellee.

KINNE, J.—These three cases present one and the same question. In each case, the plaintiff filed a petition claiming damages of the defendants by reason of their selling intoxicating liquors to her husband, and asking that the same be made a lien upon certain real estate. The plaintiff, at the time of filing the petitions, filed copies of the same with the clerk of the district court. On the same day the defendants filed a motion to strike the petitions from the files. The material part of said motion reads:

“The plaintiff has failed and neglected to comply with the rules of this court relating to the filing of pleadings in actions brought or pending herein, in this: She has failed to file a plain copy of the petition in this action for the use of the defendants. The pretended copy of the petition for the use of the defendants is so blurred and illegible as to be entirely useless to the defendants, and they are unable to read the same, or to make use thereof in preparing a pleading to meet the issues tendered by the petition, all of which will appear by reference to the copy of the petition filed by the plaintiff, which is hereto attached as

Exhibit A., and made a part of this motion, and also by the evidence of the clerk of this court, showing that the copy hereto attached is the copy, and the only copy, of the petition filed herein by the plaintiff, which evidence the defendants hereby tender, and ask leave to introduce, by an oral examination of said clerk."

Thereafter, the court made the following order overruling said motions:

"And now, at this time, the motion of the defendants to strike the plaintiff's petition from the file, because no plain and legible copy of said petition has been filed therewith, coming on to be heard, whereupon the defendants offer the evidence of the clerk, and, after argument by counsel, said motion is submitted to the court, and pending a ruling on said motion the plaintiff having prepared and filed a copy of her petition which is plain and legible, the defendant's motion to strike the petition from the file is overruled; and the defendants object and except to said ruling, overruling their motion."

At a later day in the term the causes came on for a final hearing, and the defendants, failing to answer or plead, were defaulted, trial was had, and judgments entered in each case against the defendants. The defendants appeal, assigning as error the overruling of their motions, the allowing plaintiff to file copies of the petition, and proceeding to trial, and the rendition of the judgments against them.

I. The judgments below must be affirmed. This record does not show that the copies of the petitions first filed failed, in any respect, to comply with the rule. It appears that evidence of the clerk of the court was received. It was not preserved, and is not before us. We are justified, in the absence of the evidence, in assuming that it showed that the copies first filed sufficiently complied with the rule, and, therefore, the court properly

1. APPEAL: review  
of order on  
motion: rec-  
ord.

overruled the motions to strike. The fact of filing second copies is not, of itself, a confession of the motions. The ruling of the court does not determine that the first copies were not in compliance with the rule.

II. The motions in these cases were properly overruled for the reasons heretofore given, and ordinarily we should not say more; but counsel for appellant insist that there is some real or apparent conflict in the decisions of this court, wherein rule 1, governing practice in the district courts, is construed. The cases referred to are *Burgit v. Case*, 84 Iowa, 33, and *Searles v. Lux*, 86 Iowa, 61. We do not think there is any conflict in the construction of the rule as given in the two cases. The rule in question was adopted by the convention of district judges held in pursuance of the statute, and is as follows:

2. District court rules: copies of pleadings: discretion of court.

“Every party, at the time of filing any petition, answer, reply, demurrer, or motion, except a motion for continuance or change of venue, shall file with the same one plain copy thereof for the use of the adverse party, and on failure to do so the cause may be continued at the option of the adverse party, or the paper so filed stricken from the files.”

In the *Burgit case* the copy of the motion was not filed until some six weeks after the filing of the motion. It was contended by the appellant, in that case, that the rule was complied with, if the copy was filed when first called for by the party for whose benefit it was designed. In the opinion, the court shows that the result of such a construction of the rule might be to require an examination, in each case, to determine as to whether the failure to file the copy had worked any prejudice to the adverse party. The holding in the case is not that the adverse party could, at his election, have the case continued, or the pleading stricken from the files; but the full extent of the decision is summed up

in the closing words, that "the district court had the power to enforce it (the rule) by striking the motion filed in violation of its provisions from the files, on the application of intervenor." It is not said or held that the court was required to strike a paper filed, when no copy is filed, from the files. Its right to do so is maintained, but it is not held that the rule enjoins such a duty on the court, at the option of the adverse party. The discretion of the district court was not considered, in that case, at all.

In the *Searles case*, the discretion of the district court was discussed and passed upon, and the construction of the rule therein adopted was, in effect, that the party might, at his option, have the case continued, or not, and that he could not insist upon the paper being stricken from the files; that that was a matter discretionary with the court, under the facts; and that "its exercise to strike should only be when to refuse would result in prejudice."

It thus appears that there is in fact no conflict, real or apparent, between the two cases, when we consider just what was determined and discussed in each case. The last case holds, as the first one does, that the court may strike the pleading from the files; and in the last case another question is also considered, as to whether the court is required to strike the pleading at the instance of the adverse party. We are content with the construction of the rule given in the *Searles case*, which, as we have said, is not in conflict with the holding in the other case. The court properly exercised its discretion, in refusing to strike the petition from the files. Plain copies were filed long before the trial of the cases, and there is no pretense that the defendants were in any way prejudiced by the fact that the copies, which were in fact filed with the petitions, were not plain and legible, if such was in fact the case. In any view, the action of the court was correct, and the judgments below will be **AFFIRMED**.

I. S. MUCCI, Appellee, v. F. W. HOUGHTON,  
Appellant.

1. **Evidence; LEADING QUESTIONS: ERROR WITHOUT PREJUDICE.** The allowance of leading questions and the admission, in evidence, of the conclusions of a witness are not grounds for the reversal of a cause where it appears that in the subsequent course of the trial every fact and circumstance connected with the subject of the witness' testimony were given in detail.
2. ———: **TESTIMONY OF EXPERTS: PRACTICE.** Where it was sought to introduce the testimony of experts before proof of the facts upon which such testimony was based, though such proof was afterward made, *held*, that the exclusion was without prejudice where it appeared that the expert was afterward called, and testified as such upon every question involved in the case.
3. **Physicians: MALPRACTICE: DISMISSAL OF PATIENT BEFORE RECOVERY: DEGREE OF SKILL REQUIRED.** In an action against a surgeon for negligently dismissing the plaintiff from treatment for a fractured arm before the same was fully healed, the court instructed the jury that the defendant was liable, unless, in making up his mind to dismiss the plaintiff, the defendant exercised reasonable and ordinary care and skill, and had regard for, and took into account, the well settled rules and principles of medical and surgical science. *Held*, that the instruction was not erroneous as imposing a higher degree of care and skill than the law requires.

*Appeal from Council Bluffs Superior Court.*—HON.  
J. E. F. MCGEE, Judge.

WEDNESDAY, JANUARY 17, 1894.

THE plaintiff is a gardener by occupation. The defendant is a physician and surgeon. On the eleventh day of June, 1890, the plaintiff sustained a fracture of his left arm between the wrist and elbow. Both of the bones of the arm were broken. He employed the defendant to reduce the fracture and treat the injury. The defendant at first bound up the arm in splints, and afterwards incased it in a plaster cast. After giving attention to the injury until the seventh day of

August of the same year by examining the condition of the fracture, the cast was removed, and the surgical attention ceased. The plaintiff claims that the defendant treated the injury so unskillfully that, when the treatment ceased, the injury was not cured, but a false joint was created between the elbow and wrist at the place of fracture. This action was brought to recover damages for the alleged malpractice. The defendant admitted the employment as alleged, but denied all negligence. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals. —*Affirmed*.

*Wheeler & West, Emmett Tinley and Harl & McCabe*, for appellant.

*Frank Trimble and W. H. Ware*, for appellee.

ROTHROCK, J.—There are a large number of errors assigned upon rulings upon the admission and exclusion of evidence offered by the respective parties. We will proceed to consider such of the questions raised as, upon a careful examination of the record, we think require special mention.

1. EVIDENCE:  
leading ques-  
tions: error  
without  
prejudice.

The plaintiff, in the course of his examination as a witness, was asked the following question: "Now, I want to ask you if you fully complied with all the instructions of defendant in reference to this arm, and your treatment and care of it while he was treating you?" This question was objected to on the ground that it was leading, and also called for the expression of an opinion. The objection was overruled, and the witness answered the question in the affirmative. It may be that the question was technically objectionable, as being leading, but there was no prejudice to the defendant for that reason, because, in the subsequent progress of the case, every fact and circumstance con-

nected with the treatment of the plaintiff by the defendant was detailed over and over again by the plaintiff. For the same reason, the conclusion of the witness was lost in the particularity with which all the facts were detailed to the jury. We doubt very much whether the question called for the conclusion of the witness. It appears to us it was not improper to permit the witness to state in general terms that he complied with the instructions given. It was not practicable for him to state what he was told to do, and then relate the particulars of what he did.

II. When the plaintiff concluded introducing his evidence in chief, the first witness introduced by the defendant was Dr. T. B. Lacey, a physician and surgeon of sixteen years' practice; and, after stating in a general way what was proper treatment in such a case, the record shows the following questions asked of the witness by the defendant's counsel, and the objections and rulings thereon:

2. —: testimony of experts: practice.  
“*Question.* What effect would the use of a fractured arm thus incased have upon the union of the bones, even the moderate use? Objected to on the ground that they have not shown that the arm in question was ever used at such time. Sustained. Defendant excepts.

“*Question.* Suppose an arm broken as this one has been should be properly incased in splints within the twenty-four hours from the time of the injury, and be properly treated for six weeks from the time it was incased, and at the end of that time should present the appearance of the ends of the bones being in apposition, and upon measurement should show that the arm was of the exact length of the corresponding member, how could that arm get in the condition in which you now see this one? Objected to, as incompetent, and assuming a fact, to wit, that at the time the splints were taken off, or at the end of six weeks, the bones were examined and found to be in proper position, which has not been proven in this case, but; so far as

the testimony has gone, the contrary appears, and the question is not properly confined to the facts, so far as the testimony shows them in this case. Sustained. Defendant excepts."

It is claimed with great earnestness that these rulings were erroneous and prejudicial. It may be that, if there were nothing more from this witness on that subject than these questions and rulings thereon, there might be ground of complaint of the rulings by the appellant. But the record shows that, immediately after these rulings, the defendant was put upon the stand as a witness, and testified fully as to the treatment he gave the plaintiff for the fracture, and, after the examination of one other witness, Dr. Lacey was recalled, and testified fully as an expert upon every question involved in the case. His testimony is explicit, full, and intelligent, and covers the questions above set out, and to which objections were sustained. We think the rulings of the court were in this respect correct. The fault, if any, was that the defendant's counsel sought to introduce their expert evidence first, and afterwards the facts upon which the expert evidence was based. This would be, to say the least, irregular practice.

III. It is claimed that the third paragraph of the charge of the court to the jury was erroneous. It was as follows:

"If a physician or surgeon be sent for to attend a patient, the effect of his responding to the call, in the absence of a special agreement, will be an engagement to attend the case as long as it needs attention, unless he gives notice of his intention to discontinue his services, or is dismissed by the patient; and he is bound to exercise reasonable and ordinary care and skill in determining when he should discontinue his treatment and services. If you find from the evidence that the condition of the

3. PHYSICIANS:  
malpractice:  
dismissal of  
patient before  
recovery: de-  
gree of skill  
required.

plaintiff's arm is due to his having been dismissed when he ought not to have been dismissed, the defendant would be liable, unless the evidence further satisfies you that the defendant, in dismissing him, if he did dismiss him, used ordinary and reasonable care and skill in determining when to dismiss him; and if he dismissed him under a mistaken judgment he would be liable, and you should hold him liable, unless you find from the evidence that, in making up his mind when to dismiss him, he exercised reasonable and ordinary care and skill, and had regard for, and took into account, the well settled rules and principles of medical and surgical science."

It is urged that the last part of this instruction requires of the defendant a greater degree of diligence and skill than the law imposes upon a physician and surgeon in the practice of his profession. He was required by the instruction, in determining whether the plaintiff had so far recovered as to require no further medical or surgical attention, to exercise reasonable and ordinary care and skill, and to have regard to and take into account the "well settled rules and principles of medical and surgical science." We do not think that there is any error in this part of the instruction. In another part of the charge the jury were told that the law required the defendant to have and exercise the average or ordinary skill possessed by members of his profession in that locality. This, surely, would require him to observe the well settled rules and principles appertaining to his profession.

IV. It is claimed that the verdict finds no support in the evidence. It is enough to say that there was a fair conflict of evidence on every material question in the case. It is conceded that the plaintiff's arm was not restored. Whether it was the fault of the defendant or the plaintiff was a fair question, under the evidence, for a jury to determine.

The judgment of the district court is **AFFIRMED**.

THE STATE OF IOWA, Appellee, v. WILLIAM ORR,  
Appellant.

89	613
127	681
89	613
139	461

1. **Highways: CROSSING BRIDGE WITH STEAM ENGINE: INDICTMENT.** An indictment charging one with driving a steam engine over bridges and culverts without planks, contrary to chapter 68 of Acts of the Twenty-Fourth General Assembly, but not alleging that the accused is the owner of such engine, is fatally defective.
2. ———: ———: ———: **DUPLICITY.** It being unlawful under said statute to drive a steam engine over "any bridge or culvert on any public highway," an indictment charging the defendant with driving such an engine over "certain bridges and culverts on the public highway," is bad for duplicity.

*Appeal from Jones District Court.*—HON. J. H. PRESTON, Judge.

WEDNESDAY, JANUARY 17, 1894.

THE defendant was convicted, before a justice of the peace, for a violation of chapter 68, Acts of the Twenty-Fourth General Assembly, with reference to driving steam engines over bridges and culverts without the use of planks. He appealed to the district court, where he was again convicted, and he then appealed to this court.—*Reversed.*

*Sheean & McCarn*, for appellant.

*John Y. Stone*, Attorney General, for the State.

GRANGER, C. J.—I. The information upon which the defendant was tried is as follows: "The above named defendant is hereby accused of the crime of driving and operating a steam engine over bridges and culverts without planks, for that the defendant, on the twenty-third day of September, A. D. 1892, at and

1. **HIGHWAYS:**  
crossing  
bridge with  
steam engine:  
indictment.

within Madison township, in said county, did willfully and unlawfully drive a steam engine over certain bridges and culverts on the public highway within Jones county, Iowa, without laying down and using planks, as required by law, contrary to the statutes in such case made and provided." The following are the important provisions of the act defining the offense, and providing the punishment.

Section 2. "It shall be unlawful for any person to drive a steam engine over any bridge or culvert on any public highway in this state without using four strong planks, each to be not less than twelve feet long, one foot wide and two inches thick; two of said planks to be kept continuously under the wheels of said engine while crossing said bridge or culvert."

Section 4. "Any owner of a steam engine who by himself, agent or employee shall violate any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall for each offense be fined not less than ten dollars, nor more than fifty dollars."

There was a demurrer to the information, on the ground that it did not show that the defendant was the owner of the engine, which was overruled. It should have been sustained. Section 2 of the act defines an offense, and it may be committed by "any person." Section 4 provides a punishment for a violation of the act, but limits it to any owner of a steam engine." There is a clear omission, intentional or otherwise, to make a violation of the act punishable by any person except an owner. There is some reason for thinking that it was intended to make the owner liable to punishment for whoever might be the driver of his engine, because of the language "by himself, agent, or employee." But with that construction it is equally necessary, if not more so, that he should be charged in the information as the owner. There is no view of the act under which its penalties can be applied against

any person except an owner. The fact, then, of ownership is a material and a necessary one to be averred and proved.

If it should be thought that the penalty for a violation of section 2 of the act is not that specified in the act, but that provided for generally in cases of misdemeanors where no penalty is prescribed, as in Code, section 3967, it is only necessary to say that the penalty therein prescribed is such as to make the offense triable on indictment, and hence an information would not lie, and a justice of the peace would be without jurisdiction. But it is very manifest from the act itself that it was intended to provide the penalties for its violation.

II. It is further said that the information is bad, as charging more than one offense. It charges that  
2. \_\_\_\_: \_\_\_\_: \_\_\_\_: "the defendant, on the twenty-third day  
duplicity. September, 1892, at and within Madison township, in said county, did willfully and unlawfully drive a steam engine over certain bridges and culverts on the public highway within Jones county," etc. It is not contended to us but that, if the information charges two or more offenses, it is bad; but it is urged that it does not, and that wherein it charges the driving across the bridges and culverts it is not unlike an indictment for larceny wherein the taking of several articles is charged as one offense. In case of such an indictment the taking of the articles constitutes but a single act, but one taking. It can not be said that the driving over two or more bridges and culverts is but one act. The driving over each bridge or culvert is a separate act that of itself constitutes an offense. The language is that "it shall be unlawful for any person to drive a steam engine over any bridge or culvert." When one bridge is driven over, the offense is complete. The driving over another is a separate act, and a separate offense. We think the informa-

tion is bad, as charging more than one offense, and that there can be no legal conviction under it. The judgment is REVERSED.

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H. C. HEFNER, Appellant, v. J. L. HAYNES, Appellee.

**Sale : WARRANTY: AGREEMENT IN EVENT OF BREACH: RIGHTS OF VENDEE.**

The sale of a stallion under a warranty, that he is a breeder, and the agreement that if he does not give satisfaction he "may be exchanged for another of equal value," will not preclude the vendee, in the event of a breach of the warranty, from keeping the horse, and refusing to pay therefor beyond his actual value.

*Appeal from Page District Court.*—HON. A. B. THORNELL, Judge.

THURSDAY, JANUARY 18, 1894.

ACTION in equity by which the plaintiff demands judgment on certain promissory notes, and the foreclosure of a chattel mortgage given to secure the same. The notes were executed by the defendant to the plaintiff for the purchase money of a stallion. The defendant answered, averring a breach of warranty of the stallion, and also set up a counterclaim, and demanded judgment for money paid on the notes, and for expenses attendant upon keeping the horse. There was a hearing on the merits, and a decree dismissing the petition at the plaintiff's cost. The plaintiff appeals.—*Affirmed.*

G. B. Jennings, for appellant.

W. P. Ferguson, for appellee.

ROTHROCK, J.—The evidence shows that at the time of the purchase, and as evidence of the contract, the plaintiff delivered to the defendant an instrument partly written and partly printed, and signed by the plaintiff. The following is a copy of said instrument.

"OFFICE OF O. O. HEFNER, Importer of English Shire Draft Horses. A choice lot of superior horses constantly on hand, for sale at reasonable prices. Every animal registered, and guaranteed a breeder. Time given, if required.

"NEBRASKA CITY, NEB., December 4, 1888.

"Sold this day to J. L. Haynes one imported horse, and, if said horse don't give satisfaction, said horse may be exchange for another of equal value, of anything we have on hand.

"H. C. HEFNER."

This instrument was a guaranty or warranty that the horse was a breeder. If he was an average breeder, the warranty would be fulfilled, and there could be no defense to the notes for a breach of the warranty. But the evidence shows quite satisfactorily that the horse was not an average breeder, and that in fact he was, for that reason, worthless as a stallion. The defendant paid three hundred and forty dollars on the notes given for the purchase money, and it is shown beyond question that the money paid was more than the horse was worth.

It is claimed by the appellant that the failure of the horse to get colts was because of improper treatment or want of attention and care by the defendant of the horse while he was kept by the defendant for service as a stallion. The evidence did not support this claim.

The appellant presents the case upon the theory that the only right the defendant had for redress, if the stallion failed as a breeder, was to return him to the plaintiff, and exchange him for another stallion. We think the return of the horse was optional with the defendant. The contract does not provide that a return and exchange shall be made. It is a full warranty, and provides, if the "horse don't give satisfaction," he "may be exchanged for another of equal

value." This option to exchange does not preclude the defendant from keeping the horse in case there was a breach of the warranty, and refusing to pay more than he was worth. That is just what he did by retaining the horse, and resisting the payment of the notes in suit.

The defendant's counsel claims that the court should have rendered judgment for the defendant on his counterclaim for some two hundred and sixty dollars. It is a sufficient answer to this contention to say that the defendant did not appeal, and must, for that reason, be held to acquiesce in the decree of the district court. **AFFIRMED.**

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**CITIZENS' STATE BANK, Appellee, v. COUNCIL BLUFFS FUEL COMPANY *et al.*, Appellees, and C. F. LUCE, Garnishee, Appellant.**

1. **Chattel Mortgage: VALIDITY CONTESTED IN GARNISHMENT PROCEEDING.** The remedy provided by chapter 117 of Acts of the Twenty-First General Assembly, for contesting the amount due upon a chattel mortgage, is not exclusive, and a creditor who has garnished a chattel mortgagee in possession may attack the validity of his mortgage in the garnishment proceeding.
2. **Garnishment: LIABILITY OF GARNISHEE.** Where a garnishee pays no attention to the process served upon him, and obstinately places himself in a situation where he may suffer loss, he can not for such reason escape liability in the garnishment proceeding.
3. ———: ———: **MAY EXCEED LIABILITY TO DEFENDANT.** Where a garnishee holds property of the defendant under a fraudulent conveyance the extent of his liability is not measured by the rights of the defendant against the garnishee.
4. ———: **INSTRUCTIONS TO JURY.** A cause will not be reversed on the grounds, that the instructions to the jury are not as clear as they might have been, and that in one or two instances therein the court referred to the garnishee as defendant, when the charge as a whole announces correct principles of law applicable to the case, and it is apparent that no prejudice has resulted.
5. **Special Verdict: INTERROGATORIES.** It is not error for the district court to refuse to submit interrogatories to the jury for special findings as to facts about which there is no controversy

89	618
92	252
89	618
102	257
89	618
109	257
89	618
113	669
89	618
114	627
89	618
120	735
89	618
143	6

6. **Garnishment: LIABILITY OF GARNISHEE: POSSESSION AS AGENT.**

The jury having found specially that the garnishee knew when he took possession of the property in question under the mortgage, and when he sold it, that the mortgage was executed and accepted with intent to hinder, delay or defraud creditors, *held*, that he could not escape liability by paying the proceeds of the property over to one of the parties to the fraudulent transaction on the claim that he acted as her agent only.

*Appeal from Council Bluffs Superior Court.*—HON.  
J. E. F. MCGEE, Judge.

THURSDAY, JANUARY 18, 1894.

*L. R. Bolter & Sons and Mynster & Lendt*, for  
appellant.

*Harl & McCabe*, for appellee.

KINNE, J.—The plaintiff began an action by attachment in the lower court against the defendant, and garnished C. F. Luce as a supposed debtor. The garnishee answered, denying any indebted to the defendant, averring that he owed it no money or property, and that he did not have in his possession or under his control any property, rights, or credits of the defendant; that he knew of no debts owing to the defendant, or property, rights, or credits belonging to it, and in the control or possession of others. He further stated that he had had in his possession property that formerly belonged to the defendant; that he took it under and by virtue of a chattel mortgage executed by the defendant to Mrs. M. M. Seckel; that he advertised and sold said property, as provided in the mortgage, and applied the proceeds of sale on the mortgage debt.

The plaintiff filed a pleading, controverting the answer of the garnishee, in which it averred that said Luce, when garnished, had in his possession personal property, consisting of coal, lime, hair, wood, and

other property, including book accounts and notes, belonging to the defendant, of more than three thousand dollars in value; that, subsequent to said garnishment, said garnishee converted said property by a pretended sale thereof, applying the proceeds to his own use; that in the receipt of said property, prior to said garnishment, said Luce and the defendant were acting jointly with intent to hinder, delay, and defraud the defendant's creditors; that a chattel mortgage, executed by the defendant, and under which Luce claimed to have taken possession of the property, was fraudulent and void, having been executed with intent to hinder, delay, and defraud the plaintiff, a creditor of the defendant, and the alleged sale was a part of said fraudulent scheme.

The garnishee filed an answer to this pleading, wherein he averred, in substance, that the property taken by him was taken as the agent of M. M. Seckel, by virtue of the mortgage heretofore mentioned; that, by virtue thereof, he had taken possession of it in her name, prior to being served as garnishee, and that he disposed of said property under the direction of the mortgagee, and in accord with the conditions of the mortgage; that he had no personal interest in the property, and no power to postpone or delay its sale; that the entire proceeds of said sale were received by the mortgagee, and applied in satisfaction of her mortgage; that, prior to said garnishment, the plaintiff had knowledge of said mortgage, that it was unpaid, and that the garnishee, as agent for the mortgagee, was about to take possession of and sell the property, yet took no steps to prevent the same.

On the issues thus formed, the cause was tried to a jury, which found a verdict against the garnishee, from which he alone appeals. The appellant excepted to certain evidence; to the action of the court in refusing instructions asked, and to instructions given by the

court; to the refusal of the court to submit interrogatories asked by garnishee, and to the submission of interrogatories by the court to the jury; to the overruling of his motion in arrest of judgment, and for a new trial, and for judgment in favor of said garnishee.

I. It is insisted that the remedy of a creditor of an alleged fraudulent chattel mortgagor, who desires to

1. CHATTEL mort-  
gage: valid-  
ity contested  
in garnish-  
ment proceed-  
ing.

test the validity of the mortgage, is either by a proceeding in equity to set aside and cancel the mortgage, or in the manner pointed out by chapter 117, Acts of the Twenty-first General Assembly; that such creditor has no right to test the validity of the mortgage by garnishment proceedings. Chapter 117 of Acts of the Twenty-first General Assembly, provides a mode for taking, on execution or by attachment, mortgaged personal property, by tender or deposit of the amount of the mortgaged debt. It also provides for contesting the amount due upon the mortgage. There is, however, nothing in said chapter that undertakes to limit the right of a creditor of a mortgagor, when the mortgage is alleged to be fraudulent, to the remedy therein provided to determine the fraudulent character of the mortgage. That such was not the legislative intent is also clear from the reading of section 4 of said act, which provides: "But nothing contained in this act shall in any way affect the right of any creditor to contest for any reason the validity of such mortgage." Here, then, the purpose of the legislature to preserve to creditors all rights they possessed before the passage of the act as to testing the fraudulent character of the instrument is made manifest. The purpose of the act was not to control the right of creditors to attack a fraudulent mortgage, but rather to enlarge the rights of creditors by providing a way by which an execution or attachment might be levied upon mortgaged property, regardless of the character of the mortgage. Prior to the

passage of this act, chattel property in the hands of the mortgagor, with the right of possession in the mortgagee, was not subject to process by creditors of the mortgagor, except as to the mortgagee. *Rindskoff v. Lyman*, 16 Iowa, 260; *Campbell v. Leonard*, 11 Iowa, 489; *Gordon v. Hardin*, 33 Iowa, 550; *Vanslyck v. Mills*, 34 Iowa, 375; *Buck-Reiner Co. v. Beatty*, 82 Iowa, 355. Prior to the passage of the law spoken of, a mortgagee in possession of property, taken by him by virtue of a valid chattel mortgage, was not amenable to the process of attachment by garnishment as to property thus held, except as to the surplus remaining after payment of the mortgaged debt. *Doane v. Garretson*, 24 Iowa, 351; *Davis v. Wilson*, 52 Iowa, 187; *Hoffman v. Wetherell*, 42 Iowa, 89; *McConnell v. Denham*, 72 Iowa, 494; *Buck-Reiner Co. v. Beatty*, 82 Iowa, 355.

In *Danforth v. Harlow*, 76 Iowa, 237, it was claimed that said chapter 117 rendered the giving of notice of ownership under Code, section 3055, to an officer holding property by virtue of an execution or attachment, unnecessary; but this court held such notice was not dispensed with. It said: "But the officer of the plaintiff in execution may have been of opinion that the mortgage was void for some reason. The evident purpose and design of that statute was to give junior creditors a right to subject the property after payment of the mortgage." In *Buck-Reiner Co. v. Beatty*, 82 Iowa, 357, it was held that the right possessed by a creditor of the mortgagor to reach the surplus in the mortgaged property, above the amount of the mortgage debt, was not taken away by chapter 117 of Acts of the Twenty-first General Assembly, and that such a garnishment would not be displaced by one who, as an attaching creditor, under that act, acquired a lien subsequent in point of time to the garnishment. In *Hibbard v. Zenor*, 75 Iowa, 479, it was expressly held that the levy of an attachment on mortgaged chattels, when

the attaching creditor contests the validity of the mortgage, is not void for a failure to tender or deposit the amount of such mortgage, as is required by chapter 117 of Acts of the Twenty-first General Assembly. Now, before the statute under consideration was enacted, it is clear that property fraudulently chattel-mortgaged by a debtor might be reached by a direct proceeding, by the levy of an execution or attachment thereon, or by a proceeding in equity to set aside the mortgage for fraud. These rights are still possessed by a creditor under such circumstances.

The question, however, is, may a creditor of a debtor, who has fraudulently chattel-mortgaged his property, test the question as to the character of the instrument by garnishment of the agent of the mortgagee in possession of the property, or must he resort to the other remedies. It may be conceded that the usual practice in such cases is to attach or levy on the mortgaged property, whereupon the mortgagee, or one claiming the property, replevies it, and in this proceeding the validity of the mortgage is contested. Counsel for appellant refer to the following decisions of this court, wherein it was held that prior to the passage of chapter 117 of the Acts of the Twenty-first General Assembly, the interest of the mortgagor in mortgaged personal property could not be levied on and sold on execution. *Wells v. Sabelowitz*, 68 Iowa, 238; *Campbell v. Leonard*, 11 Iowa, 489; *Rindskoff v. Lyman*, 16 Iowa, 260; *Gordon v. Hardin*, 33 Iowa, 550. In none of these cases was the validity of the mortgage contested. Now, if the mortgage given by the defendant to Mrs. Seckel was in fact fraudulent as against the plaintiff, it was, as to it, no mortgage. It created no lien upon the property as against it. In such a case it might have attached, and by that means have secured a lien on, the property itself. Now, by the process of garnishment, while no lien is created upon the mortgaged

property, even in case of a fraudulent mortgage, yet in such a case, by the garnishment, a creditor may create or establish a personal liability against the garnishee who holds such property of the mortgagor in his possession. It being conceded that a creditor of a fraudulent chattel mortgagor can reach the property by levy of an execution or attachment, and thus test the validity of the instrument, we discover no good reason for holding that the same result can not be accomplished under attachment by garnishment. In the one case, a lien is created upon the property; in the other, a personal obligation and liability may be established against the one holding the property. In the one case, the property itself is taken to satisfy the creditor's claim; in the other, the personal liability of the garnishee stands in lieu of the property. If the creditor be successful in the one case, his claim is paid by sale of the property so taken; in the other, he looks to one whom the law, after service of the garnishment process, holds liable for the value of the property in his hands. In either case the liability primarily arises because of the existence of property in fact owned by the debtor. In one case, a specific lien is created by levy or attachment; in the other, while no lien is created upon or attaches to the property itself, yet the effect of the garnishment is to confer upon the creditor a right to the payment of his claim, by reason of the indebtedness existing from the garnishee to the defendant, or because of the garnishee's having in his possession property of the defendant. We think that, by the garnishment, the plaintiff became as fully entitled to contest the validity of the alleged fraudulent mortgage as though it had attached the property itself. The conclusion reached finds support in the following authorities: 8 Amer. & Eng. Encyclopedia of Law, p. 1192; *Brainard v. Van Kuran*, 22 Iowa, 266; *Healey v. Butler*, 66 9, 27 N. W. Rep. (Wis.) 822; *Lackland v.*

*Garesche*, 56 Mo. 267; *Henry v. Murphy*, 54 Ala. 246; *Morris v. House*, 32 Tex. 492. See *McConnell v. Denham*, 72 Iowa, 497; *Shoe Co. v. Ladd*, 32 Minn. 381, 20 N. W. Rep. 334. In the last case cited, precisely the same question was involved as in the case at bar, and the court said: "And, by the garnishment of this indebtedness, as it would have done by an attachment of the mortgaged property if in existence, the plaintiff put itself in a position to question the validity of the chattel mortgage."

II. There is nothing requiring attention in the claim that the garnishee could not protect himself as against his principal. There were several ways, which we need not spend time to point out, whereby he could have fully justified and protected himself in refusing to pay over the proceeds of the property to Mrs. Seckel. He seems to have paid no attention to the process of the court, and to have obstinately placed himself in his present situation. He ought not, in view thereof, to complain.

III. Counsel insist that the rule is, that the garnishee "can in no case be held liable to an extent greater than the rights of the defendant." It is then contended that, as the defendant had mortgaged the property, and expressly provided that the mortgagee might take possession and sell the same at any time, it had no right which was enforceable as against the mortgagee or garnishee. The trouble with the claim is that counsel seem to lose sight of the fact that this is a case where the mortgage is contested as being fraudulent, and, if it be so, then the mortgagor parted with no right or title to the property, as against the plaintiff, and the mortgagee and garnishee, knowing of, and participating, in the fraud, acquired no right to the property as against the plaintiff. Now, while it is the general rule that the garnishee's liability to the defendant is the measure of his

2. GARNISHMENT:  
liability of  
garnishee.

s: —: —: may  
exceed liabil-  
ity to defend-  
ant.

liability to a creditor of the defendant, yet such rule is by no means universal. The law is that, when the garnishee holds property of the defendant under a fraudulent transfer or arrangement, the right of the plaintiff to hold the garnishee liable is not limited to the defendant's right against the garnishee. Drake on Attachment, section 452, 458, 464; 8 Am. & Eng. Encyclopedia of Law, pp. 1149, 1193.

IV. Error is assigned on the refusal of the court to give instructions asked by the garnishee. These instructions amounted to a direction to the jury to find for the garnishee. They were improper, for the following reasons: They ignored the fraudulent character of the mortgage. They assumed that the validity of the mortgage could not be contested in a garnishment proceeding, and ignored the rule that, when the garnishee holds the property under a fraudulent transfer or arrangement, the plaintiff's rights as against the garnishee are not to be limited to, or measured by, the rights of the defendant as against the garnishee.

V. It is contended that the court erred in its instructions to the jury. It may be conceded that some of the instructions are not as clear as  
 4. —: instructions to jury. they should have been, and that the court in one or two instances, spoke of the garnishee as the "defendant." On the whole, however, we think they announced correct principles of law applicable to the case. No prejudice could have resulted from the use of the word "defendant," as the word was used in connection with the name of the garnishee, and the jury must have known that the case was tried only as between the plaintiff and the garnishee. No useful purpose would be served by considering the instructions in detail.

VI. The garnishee excepts to the action of the court in refusing to submit certain special interrogato-

5. SPECIAL VER-  
dict: Interrog-  
atories.

ries to the jury. It is sufficient answer to this alleged error to say that the court had in its instructions, told the jury that the facts inquired about in said special interrogatories were either admitted by the pleadings, or established by the evidence, without conflict, and that they should take them as true. Under such circumstances, it would not have been proper to submit the interrogatories, which related to matters as to which there was no controversy. We find no error in the submission of interrogatories by the court.

VII. Many other errors are assigned. Much stress is laid by the appellant upon the fact that the garnishee

6. GARNISHMENT:  
liability of  
garnishee:  
possession as  
agent.

was in possession of the property as an agent of the mortgagee, and hence, it is insisted, he was not amenable to the process of garnishment. We think, in the pleading controverting the answer of the garnishee, it is sufficiently charged that the mortgage was fraudulent; that the garnishee knew that fact; and that he, by the sale of the property, was, with such knowledge, assisting in carrying out the scheme to defraud the defendant's creditors. The jury specially found facts showing that the mortgage was fraudulent; that the garnishee knew, when he took possession of the property, and when he sold it, that the mortgage had been executed and taken with the intent to hinder, delay or defraud creditors; and the evidence justified these findings. Under such circumstances, it was the duty of the garnishee to obey the garnishment process, and he can not escape liability by paying the proceeds of the property over to one of the actors in the fraudulent transaction on the claim that he acted as her agent only.

VIII. The appellant moves to strike out the appellee's amended abstract and argument, as not having been filed within the time required by the rules. It does not appear that the submission of the cause was delayed by

the failure to file the amendment to the abstract and the argument at the proper time. An examination of the amendment shows that it sets out matter which should have been in the appellant's abstract, and which is necessary, to the end that the case be properly understood. Under these circumstances, we think the motion should be overruled.

We discover no prejudicial error, and the judgment below is **AFFIRMED**.

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**C. SLATER, Appellee, v. CAPITAL INSURANCE COMPANY, Appellant.**

1. **Fire Insurance: PROOFS OF LOSS: WAIVER: AUTHORITY OF AGENT.** Where an agent, specially employed by an insurance company to adjust one of two losses, resulting from the same fire, but under policies upon different property, having adjusted the loss with reference to which he was employed, made an agreement with the owner of the property that proofs of loss under the other policy need not be made, and that the claim should abide the result of an arbitration agreed upon with other companies having policies upon the same property, *held*, that, in the absence of knowledge by the insured of the limitation upon the agent's authority, the insurance company was bound by the agent's agreement waiving proofs of loss.
2. ———: ———: ———: **INSTRUCTIONS TO JURY.** An instruction in such case that, the authority given the agent to settle one of said losses might be considered by the jury as a circumstance to show the relation existing between the insurance company and said agent, and in determining whether said agent was authorized to adjust and settle the other loss sustained by the plaintiff, was not erroneous.

*Appeal from Cass District Court.*—HON. A. B. THORNELL, Judge.

THURSDAY, JANUARY 18, 1894.

ACTION on a policy of fire insurance. There was a judgment for the plaintiff, and the defendant appeals.—*Affirmed*.

*Read & Read*, for appellant.

*L. L. De Lano*, for appellee.

GRANGER, C. J.—The plaintiff was the owner of a livery barn at Atlantic, Iowa, on which the policy in suit issued, which is numbered 2241. The policy issued to the plaintiff. The defendant also issued a policy on the contents of the barn to Slater & Eller, the Slater of the firm being the same person as the plaintiff. The Western Home Insurance Company also issued separate policies on the same property to the same persons. Other companies also issued policies in the same way. On the third day of May, 1888, and while the policies were in force, the building and contents were destroyed by fire. The policy issued to Slater & Eller by the defendant was numbered 2239. Notice of loss was given to the company under the two policies. Under the policy in suit, numbered 2241, no proofs of loss were made, and the defense to the suit is based on that fact, so far as concerns this appeal. In avoidance of the failure to make such proofs the plaintiff pleaded a waiver by the defendant.

One E. F. Philbrook was the adjusting agent for the Western Home Insurance Company, and visited Slater & Eller for the purpose of adjusting the loss of that company. On his way he called at the office of the defendant company at Des Moines, and was by its secretary, H. E. Teachout, asked to act for the defendant company with reference to its loss; but there is some conflict as to the extent of his authority to so act. It is the claim of the plaintiff that, under his authority, he could legally bind the defendant as to adjustment under both policies, while it is that of the defendant that he was merely authorized to "adjust or take proofs of loss," under policy 2239. At the close of the plaintiff's direct testimony, and again at the close of the testimony in the case, the defendant moved the court to instruct for a verdict in its favor on the ground that

there was no testimony from which the jury could properly find that Philbrook had authority to act for the defendant with reference to the loss under the policy in suit. In each case the motion was overruled, of which rulings complaint is here made, and the consideration of the questions thus presented will largely dispose of the questions in the case. It will only be necessary to consider the ruling upon the second motion, because if, in the further progress of the trial, after ruling upon the first motion, the state of the evidence was so changed that such a motion was properly overruled, the first ruling, even if erroneous, was without prejudice.

I. Under the authority granted to Philbrook by the defendant's secretary, he so acted that the loss of Slater & Eller was adjusted and paid.

1. FIRE INSURANCE: proofs of loss; waiver: authority of agent.

His own report to the defendant shows that he not only took proofs of loss, but that he also exercised the authority of adjusting values by agreement, and the company acted upon his report. This fact, with the statement in argument by appellant that he was authorized to "adjust or take proofs of loss," warrants the conclusion by us that he was before Slater & Eller as the company's authorized adjuster.

With this relationship fixed, we can more easily apply the evidence as to Philbrook's authority to bind the defendant as to the loss under the policy in suit. It will be remembered that other companies than the defendant and the Western Home Company, for which Philbrook acted under the Slater & Eller loss, carried risks on the livery barn; and these other companies and Slater, at the time of this adjustment by Philbrook of the Slater & Eller loss, had agreed upon terms of arbitration, and there were at that time no adjustments under the policy in suit. The facts upon which the plaintiff relies to support his plea of waiver are that,

at the time of the adjustment of the Slater & Eller loss, he and Philbrook agreed that no proofs of loss under the policy in suit need be made, and that the claim should abide the result of the arbitration with the other companies, the defendant to pay its proportion of the loss as thus ascertained; and that, relying upon such agreement, no proofs of loss were made; and this suit is for the proportion as fixed by the arbitration. The evidence is conflicting, but the state of it is such that the jury could, as it must, have found that such an agreement was made, and with its finding we should not interfere if, in making such agreement, he could legally bind the defendant.

What, then, as between the plaintiff and the defendant, is the legal effect of the authority granted to Philbrook? The company had sent him to Slater & Eller as their adjuster. Neither the company nor Philbrook intimated that his authority as an adjuster was limited, but, on the contrary, he in the one case authoritatively exercised the usual powers of such an agent. The company had said to both Slater and Eller: "This is my authorized agent. Deal with him as such." In view of the finding of the jury, we may say that Philbrook assumed the same authority for adjustment under one policy as under another. The rule of the appellant's contention would require us to hold that Slater, after dealing with him as an authorized adjuster with him and Eller in regard to the loss on the contents of the barn on one policy, could not recognize him as an adjuster on a loss on another policy from the same company to him, resulting from the same fire. We think that such a rule should not obtain. Looking to the manner in which the insurance business of the country is transacted, through agents, distant from the home offices of the companies, by which patrons neither see nor know any other than the soliciting agent, who, upon a written application, either issues or procures and deliv-

ers the policy, and, after loss, the adjuster, through whom the business of adjustment is carried on, and the consequences of the rule contended for will be apparent. The rules of law are designed to be in harmony with the natural and reasonable conduct of parties in their business intercourse, and with the changed condition in the business intercourse of the country from time to time must come such changes in the laws governing legal rights as will maintain such harmony. Philbrook had been sent to Slater as an adjuster. It is the law that Slater must, at his peril, know of Philbrook's authority to act as such; but with his knowledge that he was an adjuster came the legal right to assume that his power was commensurate with the duties of adjustment between the persons to whom he was sent and the company, as to all matters that should reasonably be considered as intended by the company. We think that, after the adjustment of the Slater & Eller loss by Philbrook, no reasonable person would have doubted his pretended authority to adjust the loss on the barn, particularly in view of the close identity of the losses as to parties and circumstances. It was the act of the company that gave rise to this reasonable belief on the part of Slater by sending Philbrook as adjuster. If an insurance company does not wish to be bound up by so broad a presumption as to the authority of an adjuster, a reasonable and very just rule, as applied to the present method of insurance business, would require that it should impart to the assured the limitations upon his authority, by which means the parties could act upon an equality, a condition absolutely forbidden by the rule contended for.

The general importance of the rule we are considering will justify a somewhat extended quotation from *Insurance Co. v. Wilkinson*, in 13 Wall. 222, where the United States supreme court has adopted reasoning somewhat similar to ours, with like conclusions. We

quote therefrom as follows: "It is well known," said the court, "(so well that no court would be justified in shutting its eyes to it), that insurance companies organized under the law of one state, and having in that state their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agents represent. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hand to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said or done in making the contract. Has he no right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy; the argument being that, as to all other acts of the agent, he is the agent of the assured. The proposition is not without support in some of the earlier decisions on the subject; and at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to a system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the

insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are *prima facie* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal."

The arguments in that case apply with strong, if not with equal, force to the business of fire insurance, and to the duties and authority of agents acting for companies after losses occur. In view of the business zeal and competition of the times, with insurance companies we may say "no stone is left unturned" to secure applications, and to this end agents wait upon desired customers in field and shop and home, to urge their superior claims for patronage. After a loss occurs, agents are promptly on the ground for investigation, conference, and adjustment. Under the business education of the times they are factors by and through which patrons may know and deal with the companies. The agent is the representative of the company. Now, it is certainly a reasonable rule that when an agent approaches a patron who has met with a loss, he may know to what extent he can safely act or deal with him as such agent. The company has that knowledge. If they are to do business upon equal terms, the patron should also have it. It is hardly to be expected that the business of adjustment must await a correspondence between the assured and the company to know the fact. But two other methods are open: *First*, that the company shall give notice of the authority possessed by its agent; or, *second*, that the assured may lawfully as-

sume that the agent has authority to transact the business in hand as if possessing general powers for that purpose. Such a rule has full support in *Insurance Co. v. Wilkinson*, *supra*, and also in considerations of both public and private good. See, also, as bearing on this question, *Silverberg v. Insurance Co.* 7 Pac. Rep. (Cal.), 38, and, to some extent *Insurance Co. v. Galatin*, 3 N. W. Rep., (Wis.) ,772. There are very many cases in which other, but somewhat kindred, subjects are discussed, wherein, from the reasoning, this position receives support. Of those, see *Morrison v. Insurance Co.*, 6 S. W. Rep. (Tex. Sup.) 605; *Cleaver v. Insurance Co.*, 39 N. W. Rep. (Mich.), 571; *Schoener v. Insurance Co.*, 7 N. W. Rep. (Wis.), 544; *Alexander v. Insurance Co.*, 30 N. W. Rep. (Wis.) 727, and cases therein cited. It should be stated that the state of Wisconsin has a general statute on the subject, which controls the decisions of that state to some extent. We think the facts of this case justify the application of such a rule, and that the company is responsible for failure to make the proofs of loss. The evidence and admissions were such that, under the law as we have expressed it, it was not error to refuse the motion to instruct the jury to return a verdict for the defendant.

II. There is a complaint that the court admitted evidence as to the Slater & Eller loss and adjustment, <sup>2. —: —: —: instructions to jury.</sup> and it will be seen that we think such testimony was proper, as showing the connection of the two losses, and the relation of the parties to this suit in the two transactions.

The court told the jury that "authority from the defendant to Philbrook to adjust and settle the Slater & Eller loss would not give authority to bind the defendant as to the loss of the plaintiff under the policy in question," and of this the appellant does not complain; but the court further says: "Still the fact that

authority was given him to settle the Slater & Eller loss is proper to be considered by you as a circumstance to show the relation existing at the time between defendant and said Philbrook, and from these and every other fact and circumstance shown by the evidence you must say whether said Philbrook was authorized to adjust and settle plaintiff's loss or not." We see no error in the instruction. The two statements are not in conflict. The first deals with the legal effect, only, of a particular fact, and the latter permits its use with other facts to reach a conclusion. It may be said that the theory on which the court submitted the case differs from the rule announced by us in this: that it required the jury to find as a fact that Teachout authorized Philbrook to act for the company in adjusting the Slater loss, without stating the presumption arising from the fact of his being sent to Slater as the company's adjuster. But the appellant can not complain of the neglect to state a presumption of law against it. We think the effect of the instructions, taken together, was to permit the jury to assume from the manner in which Philbrook was sent, in view of the entire surroundings, the authority to act in the Slater case. While the court did not, in terms, state the rule as to presumptions, it was inferable from the instructions given.

There is no error in the record, and the judgment is AFFIRMED.

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B. F. RUNNELS, Appellee, v. SAMUEL M. SMITH *et al.*,  
Appellants.

1. **Former Adjudication: SPECIAL VERDICT: ESTOPPEL.** Where, in an action against R. S. and others as copartners, the jury found specially that a partnership existed between all of the defendants, save S., but that he was liable to creditors because of having allowed his name to be used as a member of the firm, *held*, that the fact of the partnership not being in issue in such action, and judgment hav-

ing been rendered therein against all of the defendants, without fixing the order of their liability, R. was not estopped thereby from subsequently maintaining an action against S. for contribution on account of the debts of said partnership.

2. **Partnership: CONTRIBUTION: FRAUDULENT CONVEYANCES.** Upon an attempted settlement between R. and S. as partners, it was found that the known debts of the firm could be paid with the sum of fifteen hundred dollars if S. would waive his claim against the firm, in partial satisfaction of which he had received a conveyance of the firm real estate. R. thereupon paid said sum of fifteen hundred dollars, but S., instead of waiving his claim, assigned the same to his son, to whom he was indebted, but the assignment was made with intent to hinder and delay creditors. *Held*, that the assignment was fraudulent as against R., and that in an action by R. against S. for contribution, the latter was not entitled to credit for the amount of his claim, and also to the value of the real estate conveyed to him by the firm.

*Appeal from Montgomery District Court.*—HON. N. W. MACY, Judge.

THURSDAY, JANUARY 18, 1894.

ACTION in equity for an accounting, and to compel contribution on account of partnership debts. There was a hearing on the merits, and a decree in favor of the plaintiff. The defendants appeal.—*Affirmed*.

*F. M. Davis* and *C. E. Richards*, for appellants.

*J. M. Junkin*, for appellee.

ROBINSON, J.—The plaintiff alleges that in the year 1884 a copartnership, under the name of H. N. Kinkade & Company, was engaged in doing a general banking business in the town of Elliot, in Montgomery county; that the firm was composed of H. N. Kinkade, W. H. Kinkade, and the defendants Samuel M. Smith and C. W. Mercer; that in the month of October of that year the firm became insolvent, and failed in business; that, after the failure, the plaintiff and the persons named as copartners became involved in litiga-

tion with the creditors of the firm, which resulted in judgments against those persons and the plaintiff; that the assets of the copartnership were exhausted in paying the judgments, and that, after that was done, the plaintiff paid a large amount in excess of that paid by the defendant Samuel M. Smith for the same purpose; that some of the judgments are unpaid; and that debts of the firm, not in judgment, are outstanding; and that the Kinkades and Mercer are insolvent. The plaintiff asks for a complete settlement of the affairs of the firm of H. N. Kinkade & Company; that the liability of the plaintiff and Samuel M. Smith on account of the indebtedness of that firm be ascertained and fixed; and for general equitable relief. The plaintiff also alleges that Frank M. Smith claims an interest in the subject-matter of the action, and makes him a party defendant, for the purpose of having his interest determined.

The defendant Samuel M. Smith admits that the firm of H. N. Kinkade & Company was doing business as claimed, but insists that he was not a member of it, and that the persons who composed it were the plaintiff, the Kinkades, and Mercer; that, while the firm was engaged in the business specified, he consented that it might use his name as a reference only, but that it wrongfully published his name as a director of the bank. He also pleads an estoppel and a settlement. The defendant Mercer admits that he permitted himself to be known as a member of the firm, and pleads a settlement with the plaintiff. The defendant Frank M. Smith claims to own, as the assignee of Samuel M. Smith, a certain certificate of deposit and other liabilities of the insolvent firm, which amount to about fifteen hundred dollars.

The district court found in favor of the plaintiff, and fixed the amount of his recovery of the defendant Samuel M. Smith at the sum of twenty-five hundred

dollars, and one half of the costs. The plaintiff was required to pay the amount of a certain judgment rendered in favor of C. F. Clarke, and against the plaintiff, Samuel M. Smith, and others. Samuel M. Smith was "given credit, with his interest, in what is known as the 'bank real estate' situated in the town of Elliot, Iowa," which is described in his answer as "an interest in" lot 12, in block 11, of the town named. The district court further adjudged that Frank M. Smith was not the owner of the liabilities of the bank which he claims, and that neither he nor Samuel M. Smith is entitled to any allowance on account of them, as against the plaintiff. It was also adjudged that, as between the plaintiff and Samuel M. Smith, the defendant Mercer was not liable in this action. Although nominally a party to the appeal, Mercer does not appear to have any interest in it.

I. For some time before the twenty-fifth day of July, 1884, the plaintiff, who is a farmer, resided at Hawthorne, five miles west of Red Oak, in Montgomery county. He was the owner of ten thousand dollars of the capital stock of the Valley National Bank of Red Oak. H. N. Moore owned a portion of the remainder of the stock, and he and Hiram N. Kinkade, under the name of H. N. Moore & Company, owned and carried on a banking business at Elliot, a town on a branch railway about fourteen miles northeast of Red Oak. Warren Kinkade, a brother of Hiram, was cashier of the Valley National Bank. On the day last named an agreement was entered into by Moore, H. N. Kinkade and the plaintiff, by which the latter was to acquire the ownership of the banking business at Elliott, which had been carried on by H. N. Moore & Company, and to lot 12, in block 11, in that town, and was to transfer his stock in the Valley National Bank to Moore and Kinkade. The stock was transferred to them on that day, and a deed for the lot was executed

by them to the plaintiff. There is a conflict in the evidence in regard to some of the terms of the agreement, the original having been lost. The plaintiff insists that it did not give him possession of the bank, and that he was not required to take possession until the fifteenth day of the next September. That is denied by the defendants, who contend that the agreement gave to the plaintiff the immediate possession of the bank. It is clearly shown that the business of the bank was continued in the name of H. N. Moore & Company until the eighth day of August, and that from that time until the bank closed it was carried on in the name of H. N. Kinkade & Company. The plaintiff testifies that he never took possession of the bank, and that, becoming satisfied that he could not carry it on, he sold it to H. N. Kinkade, to whom he executed a deed to the lot on the seventh day of August. A certificate of deposit for the sum of eight thousand, nine hundred and twenty dollars, purporting to have been issued by H. N. Moore & Company, dated August 7, 1884, but which the plaintiff and Moore agree in saying was issued when the agreement of sale was made, was retained by the plaintiff. He claims that it was given him as security, to be surrendered when he took possession of the property, and that, by his agreement with Kinkade, for the sale of the bank, he was to retain it as the consideration of that sale. Moore denies that it was issued by virtue of any agreement to which he was a party. What the fact in regard to that matter is, we do not find it necessary to determine.

At the time the transactions we have described occurred, the defendant Samuel M. Smith resided at Milford, about nine miles east of Elliot, and had done some business with the bank of H. N. Moore & Company at that place. He and the plaintiff were not personally acquainted with each other. In July he was told by Kinkade that the plaintiff ex-

pected to buy Moore's interest in the bank at Elliot, and consented to the use of his name by the new bank as a reference. He did not own any interest in the bank, but after the seventh day of August he was announced in the cards and other advertising mediums of the bank as a director, and in like manner the plaintiff was announced as its president. Neither the plaintiff nor Smith authorized the use thus made of their names, although Smith knew of such use, and it is probable that the plaintiff did also, but neither of them made any public denial of the official character so given them. There is some evidence of declarations made by the plaintiff after the seventh day of August which indicate that he was interested in the bank, but some of the alleged declarations are denied by him, and others can be explained on the theory that he expected to pay the certificate of deposit which he held. A careful examination of the entire record leads us to conclude that he was not interested in the bank as owner after that date, and that he and Samuel M. Smith stood in the same relation to it; hence it follows that, unless the plaintiff is estopped to claim otherwise, their liability for the payment of the debts of the bank is the same. That is practically conceded in the argument of counsel for appellants.

II. After the failure, in October, 1884, several actions were brought by different creditors of the bank against the Kinkadds, Samuel M. Smith, Mercer and the plaintiff, to recover various amounts which the bank was owing.

1. FORMER adjudication:  
special verdict: estoppel.

The petition in each action alleged that all the defendants were members of the firm of H. N. Kinkade & Company, and that they were severally liable for the debts of the firm. An answer was filed for the defendants Warren H. Kinkade, Mercer, Samuel M. Smith, and the plaintiff in each case, which denied that they were or ever had been, actual members of the firm,

although it appears that Samuel M. Smith had not authorized such answers. The cases were tried in January, 1885, and in two of them the jury found, in answer to special interrogatories, that Warren H. Kin-kade and Mercer, and the plaintiff were actual members of the firm, and that Samuel M. Smith was not, but that he was liable in the action, because he had authorized the use of his name to give credit to the firm. It is claimed by the appellants that the special interrogatories were submitted to, and answered by, the the juries pursuant to a verbal agreement made between the plaintiff and others, and that, by reason of the agreement and special findings, the plaintiff is estopped to ask an accounting as between himself and Samuel M. Smith. The answer to this is that the special findings were not made on account of any issue presented by the pleadings, and the judgment rendered was against all the defendants, without fixing the order of their liability. If it had been true that, as between themselves, Samuel M. Smith was a mere "surety" of the plaintiff, within the meaning of section 3041 and 3042 of the Code, the order of liability should have been recited in the judgment. There was not only no sufficient adjudication that Samuel M. Smith was not liable as between himself and the plaintiff, but there was no valid agreement making the special findings binding upon them. Samuel M. Smith was not represented in the action by anyone, and it does not appear that any evidence in regard to the order of his liability was offered by any party to the suit. We conclude that the evidence fails to establish the estoppel pleaded.

II. After the judgments to which we have referred were rendered, in the year 1885, an attempt was made

2. **PARTNERSHIP:** by several of the parties in interest to settle the matter without further litigation.  
**contribution:**  
**fraudulent**  
**conveyances.** Mercer settled his liability to the plaintiff,

and was rightly held to be not indebted to him by the district court. An attempt was made by the plaintiff and Samuel M. Smith to adjust and settle their respective obligations, but it failed. Smith acquired an interest in lot 12, of block 11, in the town of Elliot, through a conveyance made by H. N. Kinkade, which was of the value of about one thousand, five hundred dollars, and was intended to secure at least a part of his claim against the bank, for which Frank M. Smith now seeks to recover. That interest has been appropriated for the payment of debts of H. N. Kinkade & Co., but, with that exception, Samuel M. Smith has paid nothing on account of the debts of that firm, and costs and expenses of litigation. Portions of them were paid with the one thousand, two hundred dollars paid by Mercer, and from the proceeds of the bank property. At the time the plaintiff and Samuel M. Smith attempted to make their settlement, it was found that after using the one thousand, two hundred dollars paid by Mercer, and after exhausting the real estate of the bank, including Smith's interest therein, the unliquidated claims against the bank could be paid with one thousand, five hundred dollars, to be contributed by the plaintiff, if Smith would waive his claim for about that amount; and that was the basis of the settlement attempted to be made. It did not include certain claims which had been settled by notes, on which judgments were afterwards obtained, and paid by sales of the property of the plaintiff, to the amount of more than one thousand, four hundred dollars; nor two notes owned by C. F. Clarke, which were then unknown, and on which judgment was afterwards rendered for two thousand, eight hundred and forty-two dollars and eleven cents, including attorneys' fees and costs. That judgment by the decree of the district court is to be satisfied by the plaintiff. We think the attempted settlement would have been fair as to the liabilities it contemplated.

The plaintiff paid the one thousand, five hundred dollars which was found to be his share, but Smith, instead of waiving his claim, made a pretended assignment of it to his son and codefendant, Frank M. Smith. Although there is evidence to the effect that the father was owing the son several hundred dollars, on account of which the assignment was made, yet we think it should be treated as fraudulent and of no effect as against the plaintiff, for the reason that it satisfactorily appears that the chief object Smith had in making the assignment was to hinder and delay creditors. In ascertaining the amount he should pay to the plaintiff, he is not entitled to an allowance for the claim he assigned to his son, and also to an allowance for the value of the interest in the bank property conveyed to him as security. His interest in that property, and in claims he held against the bank, will be treated as equal to the amount the plaintiff paid at the time of the attempted settlement. That leaves for adjustment the liquidated claims which were known when the settlement was attempted, and the Clark judgment. When a proper allowance for interest and costs is made, the amount which Samuel M. Smith should pay to the plaintiff appears to be about the same as that allowed by the district court. We are satisfied that its decree does substantial justice to all parties to this action, and it is, therefore, **AFFIRMED**.

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**J. C. O'BRIEN, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.**

- 1. Railroads: INJURY TO EMPLOYEE: SETTLEMENT: FRAUD: RIGHT OF ACTION.** Where a settlement with a brakeman, on account of damages sustained from a personal injury, was procured by a railroad company under representations that all of the eyewitnesses of the accident in which the injury was received were against him as to the cause of the accident, which was untrue, and that the superintendent of one of the divisions of the road had yard work which said brakeman could

89	644
101	456
89	644
103	125
89	644
108	148
89	644
110	161
89	644
124	282
89	644
137	430

do, that he would put him to work, and that he could always have work as long as he behaved himself, when in fact said superintendent did not have any positions in the yard, and the brakeman was refused work after several applications, and after waiting a reasonable time therefor, and the jury found that the brakeman was not in such a condition mentally at the time of the settlement as to be able to attend to business, and understand the nature and effect of the release when he signed it, *held*, that the settlement was not a bar to an action for damages for the injury sustained.

2. **Evidence: OPINIONS.** Questions as to a witness' physical, mental and nervous condition at the time of a stated business transaction are not objectionable as calling for an opinion.
3. **Settlement: RESCISSION ON ACCOUNT OF FRAUD: ACTION WITHOUT TENDER OF BENEFITS RECEIVED.** The settlement with the plaintiff having been procured by fraud, and he being entitled to retain the benefits received thereunder, either by virtue of said settlement or of the defendant's original liability, *held*, that a tender of the return of the amount received under the settlement was not necessary before an action could be maintained upon the original liability of the defendant.

*Appeal from Linn District Court.*—HON. J. H. PRESTON,  
Judge.

FRIDAY, JANUARY 19, 1894.

ACTION at law to recover damages for a personal injury which the plaintiff sustained while engaged in the service of the defendant as brakeman on a freight train. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*Mills & Keeler*, for appellant.

The neglect of the plaintiff to return the money received under the settlement is fatal to his recovery. He can not repudiate the contract of settlement, upon the ground of fraud, while retaining all the fruits thereof. Prompt return, or tender, of the money received was a condition precedent to suit upon the original cause of action. *East Tenn., Va. & Ga. R'y*

*Co. v. Hayes*, 10 S. E. Rep. 350; 15 S. E. Rep. 361; *Kreuzen v. R'y Co.*, 13 N. Y. Supp. 588; *Peterson v. R'y Co.*, 31 N. W. Rep. (Minn.) 516; *Bisbee v. Ham*, 47 Maine, 543; *Gould v. Cayuga Bank*, 86 N. Y. 75; *McMichael v. Kilmer*, 76 N. Y. 36; *Brown v. Hartford Ins. Co.*, 117 Mass. 479; *Schiffer v. Dietz*, 83 N. Y. 300; *Bairds v. Mayor, etc.*, 96 N. Y. 598; *Cobb v. Hatfield*, 46 N. Y. 536; *Rigdon v. Walcott*, 31 N. E. Rep. (Ill.) 161; *Deane v. Lockwood*, 115 Ill. 490; *Strong v. Lord*, 107 Ill. 25; *Estabrook v. Swett*, 116 Mass. 303; *Coolidge v. Brigham*, 42 Mass. 550; *Kimball v. Cunningham*, 4 Mass. 502; *Merrill v. Wilson*, 33 N. W. Rep. (Mich.) 721; 1 Bigelow on Frauds [Ed. 1888], 420; *Van Vechten v. Smith*, 59 Iowa, 177. The money was paid upon the settlement, as consideration therefor, and not as a mere gratuity. The court required the jury to allow it as so much paid on account. This instruction was radically erroneous. 1 Bigelow on Frauds [Ed. 1888], 425; *Rigdon v. Walcott*, 31 N. E. Rep. 162; *Bisbee v. Ham*, 47 Maine, 547; *Gould v. Cayuga Bank*, 86 N. Y. 84, and other cases cited above. Again, even if obtained by fraud as charged, still O'Brien afterward recognized and ratified the contract of settlement, by retaining and using the consideration received therefor, after knowledge of the facts; and then by bringing suit to enforce an alleged provision of the contract, regarding future employment. A person who has been defrauded must act promptly; and if he would repudiate the contract he must do nothing in affirmance of it after ascertaining the facts. Moreover, he can not repudiate it, and retain the fruits or benefits of the transaction at the same time. *Merrill v. Wilson*, 33 N. W. Rep. (Mich.) 721; *Gould v. Cayuga Bank*, 86 N. Y. 82; *R'y Co. v. Brazzil*, 14 S. W. Rep. 609; *R'y Co. v. Brazzil*, 10 S. W. Rep. 406; *Peterson v. C., M. & St. P. R'y Co.*, 31 N. W. Rep. 516; *Cobbs v. Hatfield*, 46 N. Y. 537; *Baird v. Mayor, etc.*, 96 N. Y. 598. Where

the creditor brings an action to recover damages for the fraud, retaining what he has received, he thereby affirms the compromise. *Walsh v. Sisson*, 49 Mich. 423; *Merrill v. Wilson*, 33 N. W. Rep. (Mich.) 721; *Butler v. Hildreth*, 46 Mass. 49; *Buckley v. Morgan*, 46 Conn. 393; *Strong v. Strong*, 102 N. Y. 73. Settlements deliberately made, in writing, can not be impeached upon such flimsy pretexts as made in this case. *Wallace v. R'y Co.*, 67 Iowa, 550; *Gullihier v. R'y Co.*, 59 Iowa, 422; *R'y Co. v. Cox*, 76 Iowa, 310; *McCormack v. Molberg*, 43 Iowa, 562; *McKinney v. Herrick*, 66 Iowa, 414; *Jenkins v. Clyde Coal Co.*, 48 N. W. Rep. 971; *Roundy v. Kent*, 75 Iowa, 666; *Spitze v. B. & O. R'y Co.*, 23 Atl. Rep. (1892) 310. Also *Pa. R'y Co. v. Shay*, 82 Pa. St. 202. A mere failure to perform an agreement never constitutes fraud. *Van Vechten v. Smith*, 59 Iowa, 177; *Spitze v. R'y Co.*, 23 Atl. Rep. 309. A promise to be performed in the future, although intentionally broken, is insufficient to avoid a contract of settlement, upon the ground of fraud. *Gullihier v. R'y Co.*, 59 Iowa, 422; *Rose v. R'y Co.*, Atl. Rep. (Pa.) 82; *Van Vechten v. Smith*, 59 Iowa, 177; *Lumpkin v. Snook*, 63 Iowa, 519. Fraud, in general, consists in the misrepresentation of matters of fact, not in the failure to keep a promise, thereafter to do or omit something. *Hazlett v. Burge*, 22 Iowa, 538; *Hartshorn et al. v. Day*, 19 How. 211; *Osterhouse v. Shoemaker et al.*, 3 Hill (N. Y.) 513; *Belden v. Davies*, 2 Hall (N. Y.) 433; *Franchot v. Leach*, 5 Cow. (N. Y.) 506; SWAYNE, J., in *George v. Tate*, 102 U. S. 570; *Byard v. Holmes*, 34 N. J. Law, 296; *Taylor v. Fleet*, 1 Barb. 471; *Frenzel v. Miller*, 37 Ind. 3. To avoid a contract on the ground of fraud, the facts, and not the law, must have been misrepresented. Both parties to a compromise are bound to know the law, and whether they have a good case or not. 8 Am. and Eng. Encyclopedia of Law, 636, title, "Fraud." Fraud will not

be presumed, when the facts upon which it is sought to predicate it are consistent with honesty and good faith. *Lyman v. Cessford*, 15 Iowa, 229; *Schofield v. Blind*, 33 Iowa, 176; *Pritchard v. Hopkins*, 52 Iowa, 122. The true doctrine undoubtedly is that the circumstances relied on to show fraud must lead naturally and fairly to the conclusion sought to be established, and must be inconsistent with any other reasonable or probable theory. *Turner v. Younker*, 76 Iowa, 261; *Turner v. Hardin*, 80 Iowa, 695. The evidence of fraudulent misrepresentations, to set aside a release of damages for personal injury, must be clear, precise, and indubitable; otherwise it should be withdrawn from the jury. A *scintilla* of evidence is not enough. *Pa. R'y Co. v. Shay*, 82 Pa. St. 202. The law favors such settlements of controversies, and finds a consideration for the contract looking to the compromise, in the mutual agreement of the parties to abide the result of the settlement. *Richardson, etc., Co. v. Ind. Dist.*, 70 Iowa, 576; *Adams v. Morton*, 37 Iowa, 257; 3 Am. and Eng. Encyclopedia of Law, 837, and cases cited; *Kinser v. Soap Creek Coal Co.*, 51 N. W. Rep. 1153. There can be no doubt that the release was not void, *i. e.*, a nullity, even if obtained by false and fraudulent representations. At most, it was simply voidable at the election of the injured party. O'Brien alone could disaffirm it. Until he did so, it was binding upon the company. Bishop on Contracts, secs. 671, 678 and 692; 3 Am. and Eng. Encyclopedia of Law, 931, and cases cited. *Rigdon v. Wolcott*, 31 N. W. Rep. 161.

*Rickel, Crocker & Christie*, for appellee.

The very fact that a release in full has been obtained for all claims for damages for so severe an injury for so small a consideration, is sufficient in itself to call for an explanation as to the transaction, and is strong evidence of fraud. *Cleere v. Cleere*, 3 S. Rep.

111; 2 Pom. Eq. Jur., sec. 927; *Saltonstall v. Gordon*, 33 Ala. 149; *Huguenin v. Basely*, 2 Lead. Cas. Eq. 1238; 2 Story's Equity Jurisprudence [2 Ed.] sec. 928. The disparity between the parties was a question to be taken into consideration by the jury in determining whether the release was obtained by fraud, oppression or undue influence. *Conner v. Dundee Chemical Works*, 17 Atl. Rep. 975; *Bussian v. M. L. S. & W. R'y*, 10 Am. & Eng. R. R. Cases, 716. If the release was obtained by fraud, it was void, and should no more be considered than as if it never existed. This court has expressly held that if a contract is procured by fraud, a party is not required to pay or tender back the consideration paid before bringing an action in disregard of it. *Hendrickson v. Hendrickson*, 51 Iowa, 65. The matter has also been passed upon by other courts who have taken the same views as are contended for by appellee herein. *C., R. I. & P. R'y Co. v. Lewis*, 109 Ill. 120; s. c., 19 Am. & Eng. R. R. Cases, 224-230; *C., R. I. & P. v. Doyle*, 18 Kansas, 58; *Kley v. Healey et al.*, 28 N. E. Rep. 592; *Allerton v. Allerton*, 50 N. Y. 670. If, as the evidence tended to show, that the plaintiff never assented, by reason of his incapacity, to the terms of the release, but was induced by the representations of the defendant, into the belief that the paper he signed was simply a voucher for an amount of money equal to four months' pay, it would not constitute a release of plaintiff's claim for such personal injuries. *C., R. I. & P. R'y Co. v. Lewis*, 109 Ill. 120; *Ill. Cent. R'y Co. v. Welch*, 52 Ill. 183; *Mueller v. Old Colony R'y Co.*, 127 Mass. 86.

ROTHROCK, J.—The plaintiff was rear brakeman on a freight train running between Savanna, Ill., and Van Horne, Iowa. At the time he sustained the injury for which this action was brought he was about forty years old, had a family, and had been in railroad ser-

vice for fifteen years. He had been in the employ of the defendant for about four months. On the eighth day of September, 1890, while engaged in said employment, his left hand was crushed, while attempting to make a coupling, so that it was necessary to amputate three fingers. It appears that the two cars which were to be coupled together were equipped with what is known as the "Janney coupler," which is a new improved devise. This coupler may be attached to the old style coupler by the use of a link and pin, and there was a link and pin in one of the couplers, which it was necessary to remove before the cars came together. The link and pin were in the standing or dead car. The plaintiff claims that, as the train was backed down toward the standing car, he observed the link and pin, and, knowing that they must be removed, he signaled the engineer to stop the train, and his signal was obeyed, and the train stopped, when he went between the cars to remove the link and pin; that the pin was fast, and could not readily be removed, and while engaged in the attempt to remove it he was standing with his back toward the train; when, without any signal or sign from him, the train was carelessly and negligently backed down upon him, and his hand caught between the couplers, and was crushed. Some two or three other employees testified as witnesses in contradiction to the testimony of the plaintiff, to the effect that he did not give a signal for the train to stop, and that it did not stop, but moved down to the dead car in obedience to the plaintiff's signal. It will be seen that there was a square conflict in the evidence upon that vital question in the case. We do not understand that it is claimed that the judgment should be reversed on the ground that the evidence was not sufficient to authorize a finding by the jury that the employees of the plaintiff were negligent, and that the injury was caused without any negligence of

the plaintiff which contributed to produce the injury.

I. The principal controversy on the trial in the court below arose upon an alleged settlement and release of damages, which was in writing, and signed by the plaintiff. It is in these words:

1. RAILROADS:  
injury to em-  
ployees:  
settlement:  
fraud: right  
of action.

"The Chicago, Milwaukee & St. Paul Railway Company, C. & C. B. Division, to J. C. O'Brien, Dr., residing at Delta, Iowa.

1890.	Amount.
December 5. To this amount paid in full settlement of any and all claims against said railway company on account of personal injury as stated below...	\$250 00
Less paid Wm. Simpson for board.....	39 50
	<hr/> \$210 50

"Received of the Chicago, Milwaukee & St. Paul Railway Company two hundred and fifty dollars, in full payment of the above account. In consideration of the payment of the said sum of money, I, J. C. O'Brien, of Delta, in the county of Keokuk, and state of Iowa, hereby remise, release, and forever discharge the said company of and from all manner of actions, cause of action, suits, debts, and sums of money, dues, claims, and demands whatsoever, in law or equity, which I have ever had or now have against said company, by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort, and especially from all claim which I now have or may hereafter have, arising in any manner whatever, either directly or indirectly, in whole or in part, from or on account of personal injuries received at Sabula Junction, Iowa, on or about September 8, 1890, resulting in loss of my first, third, and fourth fingers of my left hand.

"In testimony thereof, I have hereunto set my hand this fifth day of December, 1890.

"J. C. O'BRIEN."

The plaintiff claimed in his pleadings, and introduced evidence tending to show, that the said settlement and release was obtained from him by fraud and the false representations of the agent or officer of the defendant who procured his signature thereto. It is not our purpose to set out the pleadings of the plaintiff in detail. They are verbose and extravagant in statement, and contain many averments which are founded in mistake when read in connection with the evidence produced on the trial. But the pleadings do not appear to have been verified, and, after eliminating the mistakes, we think the evidence that this writing was procured by fraud and by overreaching the plaintiff was sufficient to authorize a verdict for him. And it is claimed by the plaintiff that he was in such physical and mental distress at the time the settlement was signed by him that he was incapable of entering into a valid contract of settlement. It is not our purpose to enter into a discussion of the evidence. We will state the ultimate facts which we think the jury were justified in finding from the evidence. This settlement was made by one Hinsey, upon the part of the defendant. He had been for many years engaged in settling claims of this character. He represented to the plaintiff that all of the trainmen who were eyewitnesses to the affair were against the plaintiff. He read part of the statements which had been procured from them, and stated that all were alike. This was not true. The statement of the conductor of the train was not inconsistent with the plaintiff's right to recover. He represented to the plaintiff that Division Superintendent Goodnow, at Marion, in this state, had yard work that he could do, and that Goodnow would put him to work, and that he could always have work as long as he behaved himself. Now, it may be conceded that this last statement as to work in the future was a mere false promise, and not a false statement as to an exist-

ing fact. But the statement that Goodnow had positions at yard work at Marion, Van Horne, and Perry was not true. The plaintiff immediately returned to Marion, and presented himself to Goodnow for employment, and was told that there was no employment for him. He again applied to Goodnow for work, and received the same answer. He went home to his family, at Delta, in this state, and, after a time, wrote to Goodnow, requesting employment, and received this answer:

"MARION, IOWA, March 19, 1891.

"*J. C. O'Brien, Delta, Iowa.*

"DEAR SIR:—Noting yours of the 16th instance, our business is very slack, and I have no work that I could offer you. It would be a waste of time to come here now.

Truly yours,

"C. A. GOODNOW."

It ought to be stated that when Hinsey concluded his business with the plaintiff he gave him an open letter to Goodnow, of which the following is a copy:

"CHICAGO, ILL., Dec. 5, 1890.

"*C. A. Goodnow, Superintendent, Marion.*

"DEAR SIR:—I have to day settled with the bearer, J. C. O'Brien, who was injured at Sabula Junction on September 8th last. The amount I have allowed him is very small, considering the severity of his injury, and think, in addition, that he is entitled to any courtesy that can be consistently shown him in the matter of re-employment. His hand, as you can see, will not permit him to do very hard work at first. I have not made employment a condition of settlement with him, but promised to write you, and urge that you do the best you can for him.

"Yours, truly,

"JOHN A. HINSEY, Special Agent."

It was claimed by Hinsey that he made no representations as to the fact that places in the yards on

Goodnow's division were vacant at that time, but this statement raised no more than a conflict in the evidence.

It is also claimed, and the evidence tends to show, that the plaintiff knew the contents of this letter. But the jury found specially that, at the time this settlement occurred, the plaintiff was not in such a condition mentally "as to be able to attend to business and understand the nature and effect of the release set up by the defendant when he signed it." And it was further found specially that he did not have "full opportunity and capacity to read the contract of settlement, and know its contents, before he signed it."

It is strenuously urged that the special findings are absolutely without support in the evidence. We have carefully examined the whole record, and our conclusion is that it was a fair question for the jury to determine whether the plaintiff was at the time capable of making a valid settlement of his claim, and we do not think we should disturb the verdict on that ground.

II. Objection was made because the court allowed the plaintiff to answer the following questions: "*Question*

2. EVIDENCE: Describe your physical and mental condition when you were there, at the time you signed that paper. *Question.* Describe your nervous condition at that time. *Question.* Tell the jury what your condition was at that time, as regards your physical and mental condition. *Question.* Tell the jury again, in your own way, as fully as you can, what your mental and physical condition was at the time you transacted this business you have referred to. *Question.* What was your mental condition at that time?"

It is claimed that these questions called for the opinion of the witness as to his mental condition. We do not think this position can be sustained. He was asked to describe his physical and mental and nervous condition, not to give an opinion as to what his condition was in these respects.

III. We come now to a consideration of what we regard as the material question in the case. It is conceded that the defendant paid to the

2. SETTLEMENT:  
rescission on  
account of  
fraud: action  
without tender  
of benefits re-  
ceived.

plaintiff the sum of two hundred and ten dollars and fifty cents in money, and settled a bill for his boarding, amounting to thirty-nine dollars and fifty cents; and it is claimed by the defendant that, even if the settlement was voidable by reason of the fraud, or void because the plaintiff did not, at the time it was made, have sufficient mental capacity to make a contract, yet this action can not be maintained, because it was brought without tendering to the defendant the two hundred and fifty dollars received at the time of the settlement. It is true that no tender was made. The plaintiff commenced this action on May 14, 1891, nearly two months after he was advised by Goodnow that it would be a waste of time to go to Marion to get work. The court instructed the jury that if they found for the plaintiff they should deduct from the amount awarded to him the sum of two hundred and fifty dollars, which he had already received. The verdict returned was in the sum of three thousand, seven hundred and fifty dollars.

It is undoubtedly true that the general rule is that, whenever one has a right to rescind a contract, and exercises that right, he must restore the other party to the same condition he would have been in if the contract had not been made. The defendant claims that this release of a claim for damages comes within this rule. And it is not to be denied that there are adjudged cases which so hold. See *Brown v. Hartford Fire Insurance Co.*, 117 Mass. 479. A number of other cases are cited by counsel, prominent among which is *E. Tenn. V. & G. Railway Co. v. Hayes*, 10 S. E. Rep. (Ga.) 350. We have given these cases a careful examination, and our conclusion is that they are not applicable to a state

of facts, such as is found in this case, and that there is another line of cases which, to our minds, announce the better rule. The case of *Hendrickson v. Hendrickson*, 51 Iowa, 68, is precisely in point. It is there held that, where a party has fraudulently procured the execution of a contract, he is not entitled to an offer to restore what he has received as a condition precedent to rescission. It is claimed by counsel for the appellant that this case is overruled by the later case of *Citizens' Bank v. Barnes*, 70 Iowa, 412. It is true there is language in the opinion in the last named case which is not entirely in accord with the former case. But the court expressly said that it was unnecessary to determine this question. The cases of *Gulliver v. Chic., R. I. & P. Railway Co.*, 59 Iowa, 416, and *Wallace v. Chic., St. P. M. & O. Railway Co.*, 67 Iowa, 547, were much like the case at bar. They were actions to recover for personal injuries, and settlements and releases were set up in defense. The question is not made in said cases that it was necessary to return or tender the amount received in settlement before commencing an action. It is true the question was not directly made in the pleadings in those cases, but the right to maintain the actions was not questioned by the court or counsel. That the general rule above announced has no application to an action like this, see *Chic., R. I. & P. Railway Co. v. Lewis*, 109 Ill. 120. It is there held that, "if a release of a cause of action is obtained from a person by fraud and circumvention at a time when he is incapable of making a contract rationally, and money is paid him at the time of its execution, he may repudiate the release, and bring his action without first paying or tendering back the money received by him." And in *Mullen v. Old Colony Railway Co.*, 127 Mass. 86, it was held, if a defendant obtains the signature of the plaintiff to a paper purporting to be a settlement and discharge of the cause of action, by fraudulent representations, it is merely a receipt for a gratuity, and the plaintiff may

maintain his action without returning the money paid him. See, also, *Railway Co. v. Doyle*, 18 Kan. 58; *Allerton v. Allerton*, 50 N. Y. 670; *Kley v. Healy*, 28 N. E. Rep. (N. Y. App.) 593. The last two cases are to the effect, that the rule, that he who seeks to rescind an agreement upon the ground of fraud must place the other party in as good a situation as he was at the time the agreement was made is satisfied if the judgment asked for will accomplish that result, and in such case no offer to return that which was received is necessary. In the case of *Kley v. Healy* the court uses the following language: "A more satisfactory answer, however, may be found in the principle that one who attempts to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain, either by virtue of the contract sought to be set aside, or of the original liability." This principle commends itself as eminently just. Applying it to the facts in the case at bar, we may well inquire, why should the plaintiff tender to the defendant that which the plaintiff was entitled to retain even if defeated in the action? In that event he would retain the two hundred and fifty dollars by virtue of what the defendant contends is a valid transaction. When the court directed the jury that, if the plaintiff was entitled to recover, the sum paid at the alleged settlement should be deducted from the verdict, it was, in effect, a return of the money paid for the release.

We think there is no other question in the case which demands separate consideration. The border line of doubt we have had in this case is without the question of fraud, and the incapacity of the plaintiff to make a contract. But one feature of the case appears to us to be without doubt. That is, that the plaintiff was overreached, and taken advantage of, in the settlement. He returned from Chicago to Marion in the

belief that he would be given employment. The manner in which he was received, and the refusal to give him employment after a considerable lapse of time, and the fact that he is permanently disabled from performing most kinds of manual labor, must have had great weight in inducing the jury to reach the conclusion that he was unfairly dealt with. **AFFIRMED.**

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**M. MARCUS, Appellant, v. JOHN DOHANY, Appellee.**

**Contracts: EVIDENCE: REBUTTAL.** Where in an action to recover the cost of one half of a party wall, the defendant pleaded an oral agreement on the part of the plaintiff to permit the defendant to use said wall without charge, and offered evidence thereof on the trial, *held*, that proof offered by the plaintiff in rebuttal, of a written agreement to arbitrate the question of the proportion of the cost of said wall that should be paid by either party, made after the alleged oral agreement, and signed by both parties, was erroneously excluded.

*Appeal from Council Bluffs Superior Court.*—HON. J. E. F. MCGEE, Judge.

FRIDAY, JANUARY 19, 1894.

ACTION at law to recover one half of the cost of a partition wall erected by the plaintiff on the line between lots owned by the plaintiff and the defendant. There was a trial by jury, and a verdict and judgment for the defendant. The plaintiff appeals.—*Reversed.*

*J. J. Stewart and S. B. Snyder*, for appellant.

No appearance for appellee.

**ROTHROCK, J.—I.** It is conceded that the plaintiff erected a lawful partition wall on the line of the lots of land owned by the respective parties, and that the value of the one half thereof, which is used in common by the parties, is two hundred and ten dollars. If these

were all the facts in the case, the plaintiff would be entitled to recover of the defendant the sum above named, and the court so instructed the jury. But it appears from the pleadings and evidence that, before the plaintiff erected the wall, the defendant had an old building on or near the line, and that a small part of the wall at the front thereof was over the line, and rested on the plaintiff's lot. This wall was but nine inches thick, and was not adapted to be used as a partition wall. The building of which it was a part was a temporary structure, without cellar or foundation. When the plaintiff erected his new block, the defendant removed the wall of his old building, and the plaintiff erected his wall so that one half of it was over the line, and on the lot of the defendant. The defendant's old building was connected with the new wall, so that the new wall is in fact a wall in common, and is of such thickness and dimensions as to constitute a lawful party wall.

The defendant, by his answer, claimed that before the wall in dispute was erected he made an oral agreement with the plaintiff by which the plaintiff was to build the wall, and that "defendant might occupy so much of said wall as was necessary to be used by his building without charge to said defendant," and that he was not to pay for any part of said wall. Evidence tending to establish this claim was introduced over the objection of the plaintiff, and it is claimed that this was error.

Section 2030 of the Code is as follows: "This chapter shall not prevent adjoining proprietors from entering into special agreement about walls on the lines between them; but no evidence of such agreement shall be competent unless it be in writing signed by the parties thereto, or their lawfully authorized agents, and whenever such proprietor is a minor, the guardian of his estate shall have full authority to act in all matters

relating to walls in common." We have no argument in behalf of the appellee, and are at a loss to understand the ground upon which it was claimed in the court below that evidence of the alleged parol agreement was admissible. It may be that, as the defendant's counsel makes no appearance in this court, he concedes that this evidence was erroneously admitted. However that may be, we think it proper, under the circumstances, to pass the question without deciding it, as the judgment must be reversed upon another ruling of the court, which we will now proceed to consider.

II. The petition in the case was founded upon two counts. The first count was based upon an award of arbitrators, and the second count was an ordinary claim to recover a judgment for one half the value of the wall. The action, so far as it was based on the award, was not urged by the plaintiff. The trial was had without regard to the award. As we have seen, the court permitted the defendant to give evidence of an alleged parol agreement between the parties as to the matter in controversy. This evidence consisted of the testimony of the defendant. To rebut this testimony, the plaintiff offered in evidence the written agreement to arbitrate, which was signed by the parties. An objection to this evidence was sustained. It should have been overruled, and the writing should have been admitted in evidence. We need not set it out here. It shows that at the time it was executed there had been no agreement, parol or otherwise, between the parties, but that the matter of the partition wall was in dispute, and it was signed by the parties after the time the defendant claimed that an oral agreement was made touching the matter. If the defendant's testimony was admissible at all, it was surely competent for the plaintiff to rebut it.

The judgment of the district court is REVERSED.

JAMES L. PAXTON, Appellee, v. CHARLES L. ROSS *et al.*,  
Appellants; SAME v. W. S. SHOEMAKER  
*et al.*, Appellants.

89	661
97	286
89	661
112	331
89	661
119	286

1. **Title to Real Estate: EVIDENCE: SUFFICIENCY OF PLAT.** Where, in an action to redeem property from a tax sale, it appeared that the identity of the property, as described in the deeds of both parties, was dependent upon a plat thereof, intended to be the deed of a corporation then owning the property, but which was signed and acknowledged only by one who was described as the president of such corporation, *held*, that, as the claims of both parties rested upon said plat, the defendants could not object to the introduction thereof in evidence upon the ground that it did not purport to be the act of the corporation, and was not attested by the corporate seal.
2. ———: ———: **TAX SALE: RIGHT TO REDEEM.** Under the provisions of section 893 of the Code, any right or interest in property will entitle a party to maintain an action to redeem the same from tax sale. Proof of absolute title is unnecessary. Where, therefore, in an action to redeem, the plaintiff having introduced, in proof of his chain of title, a deed made to one M. Thompson, of Washington City, District of Columbia, offered in evidence a deed purporting to be that of "Michael Thompson, of Honolulu, Sandwich Islands," but signed "M. Thompson," and the certificate of the notary recited that "Michael Thompson" signed and acknowledged said deed, *held*, that the latter deed was properly admitted in evidence without proof that the grantee in the first deed and the grantor in the second were the same person.
3. **Tax Sale for Taxes Not Carried Forward: VALIDITY: CONSTRUCTION OF STATUTE.** Section 845 of the Code, providing that any sale for delinquent taxes, not brought forward on the tax book, shall be invalid, is not in conflict with chapter 79 of the Acts of 1876, authorizing the sale of property which remains liable to sale for delinquent taxes, and which has been advertised and offered, and passed for want of bidders, for two or more years; and a sale made under the latter statute, for taxes which have not been carried forward, is invalid.

*Appeal from Pottawattamie District Court.*—HON. N. W. MACY, Judge.

FRIDAY, JANUARY 19, 1894.

THESE cases were, by stipulation, submitted together, separate decrees to be entered, and are so submitted on

this appeal. They are actions in equity, wherein the plaintiff asks to be permitted to redeem lot 3, block 16, and lot 1, block 21, in the Ferry addition to the city of Council Bluffs, from tax sales, and deeds therefor, under which the defendants claim title, which sales were made on the seventh day of August, 1882, for the delinquent taxes of the years 1877, 1878, 1879 and 1880. The ground upon which the plaintiff alleges that said tax sales and deeds are void is that said delinquent taxes were not carried forward on the tax book of 1881. It is sufficient to say of the answers that in each case the defendants deny generally the allegations of the petitions, and claim to be absolute owners of the property in question. A decree was entered in each case in favor of the plaintiff, granting the relief asked, and in each case the defendants appeal.—*Affirmed*.

*W. S. Shoemaker*, for appellants.

*Burke & Casady*, for appellees.

GIVEN, J.—I. The correctness of the abstracts being denied, we have examined the case as shown in the transcript on file, which we find to be sufficient to authorize us to consider the case *de novo*.

It is shown by stipulation that one Williams deeded land embracing the lots in question to the Council Bluffs & Nebraska Ferry Company, which

1. TITLE to real  
estate: evi-  
dence: suffi-  
ciency of plat.

deed was duly executed and recorded. The plaintiff offered in evidence the record of plats of the county, showing a plat of the Ferry addition to the city of Council Bluffs, embracing the land in question, signed by "Enos Lowe, President of the Council Bluffs & Nebraska Ferry Company," and acknowledged by "Enos Lowe, President of the Council Bluffs & Nebraska Ferry Company." The appellants objected on the ground that it was the act of Enos Lowe, and not of the Council Bluffs & Ne-

braska Ferry Company, and that the plat was not attested by the seal of the corporation. This plat was executed and recorded long prior to the tax sales in question, under which the appellants claim title. It was by that plat that the lots named were given their identity as lots 1 and 3. Without this plat, the appellants' tax deeds would be clearly void, as their description would be inapplicable to the government subdivision. It seems to us clear that both parties are claiming under this plat of Ferry addition, and, therefore, neither party is in position to question the sufficiency of the plat which they have agreed, by stipulation, was made and recorded. The appellants rely upon *Kimball v. Shoemaker*, 82 Iowa, 459, wherein this same plat was in question. In that case the plaintiff claimed certain lots under this plat, and the defendant claimed the government subdivision, and not only the sufficiency, but the existence, of the plat was in issue.

II. The appellees, in proving their title, introduced in evidence a deed from Enos Lowe to "M.

Thompson, of Washington City, District of Columbia," for the lots in question.

2. —: —: tax  
sale: right to  
redeem.

They then introduced a deed from "Michael Thompson, widower, now of Honolulu, Sandwich Islands," to "John E. McGuire, of the city of St. Paul, Minnesota." This deed is signed "M. Thompson," and the acknowledgment contains the following: "Before me personally appeared Michael Thompson, to me known to be the person described in, and who executed, the foregoing instrument, and acknowledged that he executed the same as his free act and deed." The appellants objected to the introduction of this deed on the ground that it did not purport to be the deed of M. Thompson, of Washington City, District of Columbia, but of Michael Thompson, of Honolulu, and because it is acknowledged by Michael Thompson, and not by M. Thompson. It is contended

that this deed was inadmissible, without evidence showing that the grantor, Thompson, was the identical Thompson to whom Enos Lowe had conveyed. It will be observed that the conveyance from Enos Lowe was to M. Thompson, and that the notary certifies that M. Thompson, who executed the deed to McGuire, is known to him to be the person described in, and who executed, that deed. The practice of writing only the initial letter, of given names is recognized in *Stoddard v. Sloan*, 65 Iowa, 680. The certificate of acknowledgment renders it satisfactorily certain that Michael Thompson, who appeared before the notary, is the same person as M. Thompson, who executed the instrument. We see no reason to doubt that the grantee Thompson and the grantor Thompson are the same person. To require other evidence of identity before the deed could be admitted would be to render it impracticable, if not impossible, in many instances, to trace title.

The appellants contend that, under section 897 of the Code, appellees must show, by competent evidence, absolute title in themselves, before they are permitted to question the appellants' title acquired by the treasurer's deeds. The provision of said section is as follows: "But no person shall be permitted to question the title acquired by a treasurer's deed without first showing that he or the person under whom he claims title had title to the property at the time of the sale." This action is distinguishable from *Lockridge v. Daggett*, 54 Iowa, 332, which was an action to recover possession,

*Byington v. Buckwalter*, 7 Iowa, 512. The appellees were not, therefore, required to show absolute title, to maintain this action. We conclude that said plat and deed were admissible in evidence, and that, taken in connection with the other evidence of title, the plaintiff may maintain these actions.

III. The ground upon which the appellees claim the right to redeem from these tax sales is that the delinquent taxes for which the lots were sold were not carried forward on the tax books, as required by section 845 of the Code. These sales were made under

chapter 79 of the Acts of 1876. The appellants contend that under this chapter it was not required that the delinquent taxes for the preceding years should be carried forward on the tax books. Without said chapter 79, it was required that the sale "be made for and in payment of the total amount of taxes, interest and costs due and unpaid." Code, section 871. Said chapter 79 authorizes the sale, to the highest bidder, of lands and town lots which remain liable to sale for delinquent taxes, and which had been advertised and offered, and passed for want of bidders, for two or more years. Said chapter expressly provides that "all provisions of the revenue law of Iowa not inconsistent with this act shall apply to such sale and to the redemption of any real estate sold by virtue of this act." The provision of section 845, requiring that the delinquent taxes be brought forward upon the tax book, is not inconsistent with said chapter. The purpose of said chapter was to authorize the sale to the highest bidder, of lands and town lots which had pre-

3. Tax sale for taxes not carried forward: validity: construction of statute.

taxes, that had pre-

shall be invalid." These tax sales were made on the seventh day of August, 1882, for the delinquent taxes of the years 1877, 1878, 1879, and 1880, which delinquent taxes had not been entered upon the book as required by said section 845, and it follows that the sales are invalid, and that the plaintiff, having a right and interest in said lots, is entitled to redeem the same.

The decree of the district court, as entered in each case, is **AFFIRMED**.

80 666  
127 262

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**WICKHAM BROS., Appellants, v. MARY J. MONROE, Administratrix, et al., Appellees.**

1. **Mechanic's Lien:** NOTICE OF FILING SERVED UPON OWNER'S ATTORNEY. An attorney intrusted by the owner of premises with the adjustment of claims of the contractor and subcontractors, is an agent, within the meaning of section 2134 of the Code, requiring notice of the filing of a mechanic's lien to be served upon "the owner, his agent or trustee." Service upon such agent is not impaired by the fact that the notice served is addressed to the owner by name.
2. ———: OWNER NOT LIABLE BEYOND CONTRACT PRICE. The claim of a subcontractor, for materials furnished in the construction of a building, will not be established as a lien upon the premises when it appears that the payments made by the owner and the senior liens are equal to the amount of the contract price.

*Appeal from Pottawattamie District Court.*—HON. H. E. DEEMER, Judge.

FRIDAY, JANUARY 19, 1894.

ACTION in equity to recover an amount due for labor and material furnished, for the erection of a dwelling house, and to establish a mechanic's lien. There was a hearing on the merits, and a judgment in favor of the plaintiffs for the amount due, but their right to a lien therefor was denied. The plaintiffs appeal.—*Affirmed.*

*Harl & McCabe*, for appellants.

*Stillman & Stillman*, for appellee S. A. Stillman.

ROBINSON, J.—The agreement for the construction of the building in question was entered into between the appellee Mrs. Stillman as owner, and one George S. Monroe as contractor, and provided for the payment of six thousand, nine hundred and fifty dollars for the building completed. The plaintiffs claim that, as sub-contractors of Monroe, they furnished labor and material for the construction of the building of the value of one thousand, one hundred and ninety dollars, which, with interest, is due and unpaid, and for which a mechanic's lien is asked. The appellee Mrs. Stillman claims that much of the material and labor used in constructing the building was inferior to that contemplated by the agreement, that the building is unfinished, and that it will cost one thousand dollars to complete it; that she has already paid five thousand, six hundred dollars on account of her agreement with Monroe; that there are liens superior to the claim of the plaintiffs, which will exhaust what there is, if anything, due under the agreement; and that the plaintiffs are not entitled to a lien on the building. Monroe having died, the administratrix of his estate is made a party defendant. The district court rendered judgment against her, and in favor of the plaintiffs, for the amount of their claim, but refused to establish a lien therefor as against the building in question, on the ground that no sufficient legal notice of the filing of the statement for a lien was served on Mrs. Stillman within thirty days from the date of the completion of the contract, and on the additional ground that, when the notice was served, the amount she had paid, and for which she was liable, was as great as the amount due under her agreement.

I. The last item of the claim of the plaintiff was furnished on the eighteenth day of December, 1889.

On the sixth day of the next month they  
1. MECHANIC'S  
lien: notice of  
filing served  
upon owner's  
attorney. filed, in the proper office, a statement for a mechanic's lien, and on the next day

served on Burke & Hewitt a notice in writing of the filing of the statement. The notice was directed to Mrs. Stillman, and was served on Burke & Hewitt as her "agents and attorneys." It is claimed that they were not her agents, within the meaning of the statute which provides for the service of such a notice upon the "owner, his agent or trustee." The provisions of the statute in regard to such notice are designed to enable the subcontractor to preserve his lien as against the owner, and to protect the latter from the payment of more than the contract price. Sec. 7, chap. 100, of Acts of the Sixteenth General Assembly; *Cutler v. McCormick*, 48 Iowa, 414. If the service is made upon the person who is intrusted with the business of adjusting the claims of the contractor and subcontractor, it is made upon an agent of the owner, within the meaning of the statute. There is some claim that Burke & Hewitt were the attorneys for Mrs. Stillman only for special purposes, and that they were not her agents for the purposes of receiving notice of mechanics' liens. Mrs. Stillman went to Michigan early in January, and left with Burke & Hewitt, for settlement, her business with Monroe and his subcontractors. They were empowered to make settlements for her, and to represent her in litigation which grew out of the Monroe contract. They were given the papers relating to mechanic's liens, and acted for Mrs. Stillman in the matters specified. While it is true that they were not given charge of the property, yet they had control of the business to which the notice in question referred, and service upon them was more beneficial to Mrs. Stillman, and answered the purpose for which it was intended

more fully than it would had it been served on the person in actual control of the property.

It is said the service of the notice was not sufficient because addressed to Mrs. Stillman, and not to the agents; and the case of *Steele v. Murry*, 80 Iowa, 336, is cited in support of that claim. In the case cited it was held, that a notice of the expiration of the right of redemption from a tax sale and the making of a tax deed must not only be served upon, but be addressed to, the person in possession of the land. Such a person is entitled to notice, not in a representative capacity alone, but in his own right, while, under the mechanic's lien law, the service is made upon the agent only in his representative capacity. We think the notice was sufficient in form, and that its service was binding upon Mrs. Stillman.

II. There is some disagreement in regard to the credits for extra labor and material to which the contractor was entitled, and in regard to the credits to which Mrs. Stillman is entitled, and we regret that on this branch of the case we have received but little aid from her attorneys. After deducting from the contract price the payment made by her, there appears to remain the sum of one thousand, five hundred and seventy-nine dollars, and fifty-seven cents, according to the finding of the district court, or one thousand, five hundred and fifty-seven dollars according to the claim of the appellants, to be appropriated for the benefit of subcontractors. To that should be added five hundred and seventy-four dollars, for which the district court correctly found that the contractor was entitled to a credit on account of extra labor and material furnished by him, and we have a total of two thousand, one hundred and thirty-one dollars. To offset that, Mrs. Stillman claims that she is entitled to three hundred and eighty-two dollars and forty-five cents allowed by the district

2. —: owner  
not liable be-  
yond contract  
price.

court on account of certain omissions and deficiencies in the work, and to an allowance for delay in completing the house. We think she is entitled to the allowance made by the district court for deficiencies, but not to an allowance for delay in finishing the building, for the reason that the delay was due to changes in the contract which she caused to be made.

Mrs. Stillman also claims that subcontractors' liens to the amount of two thousand, eight hundred and twenty dollars and thirty-seven cents have been established against the property, in actions which were submitted to the district court with this one, and tried on the same evidence, and that such liens are senior to the claims of the plaintiff. Of the decrees rendered in those actions establishing liens, a part amounting to one thousand, seven hundred and twenty-six dollars and thirty-eight cents, were rendered against the administratrix and Mrs. Stillman jointly, and a part, amounting to one hundred and forty-nine dollars and fifty-six cents, were rendered against Mrs. Stillman alone. It is claimed by the appellants that, as to the decrees rendered against her, Mrs. Stillman must be regarded as a principal defendant, and, therefore, that such decrees can not be regarded as superior to their claim. That is true, however, only as to a small part of the decrees so rendered. As to the remainder, Mrs. Stillman was in effect only a surety for the contractor. No doubt, she alone was liable for a part of the labor and material on account of which the decrees were rendered, but, after making proper deduction for that part, the amount remaining due on the decrees is more than sufficient to offset the balance due to the estate of Monroe under the contract, and for extras.

The appellants contend that certain items, amounting to the sum of two hundred and eighty dollars, claimed by Mrs. Stillman as credits, should not have been allowed, but, as no disposition which can be made

of them by us would affect the result in this case, we find it unnecessary to announce any conclusion in regard to them. The same is true of other matters discussed by the appellants.

It appears that the aggregate amount of the payments already made by Mrs. Stillman, and of the liens established which are paramount to the claims of the plaintiffs, is at least as great as the amount of her contract with Monroe, including her liability for extras he furnished, required her to pay. Therefore, the demand of the plaintiffs for the establishment of a mechanic's lien in their favor must be denied. The judgment of the district court is **AFFIRMED**.

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S. B. GOODENOW, Appellee, v. GEORGE FRIOTT,  
Appellant.

88 671  
97 481

**Fraudulent Conveyances:** INTENT TO PREVENT SEIZURE UNDER EXECUTION: CONSIDERATION. A transfer of personal property in consideration of the assumption by the grantee of a mortgage thereon, and of the satisfaction of an indebtedness due said grantee from the grantor, but with the mutual purpose to prevent the seizure and sale of said property under execution on a judgment held by another creditor against the grantor, is not invalid in the absence of any intent to defraud.

*Appeal from Ida District Court.*—HON. CHARLES D. GOLDSMITH, Judge.

SATURDAY, JANUARY 20, 1894.

ACTION to recover the possession of specific personal property. After the evidence had been fully submitted in the district court, a motion to direct a verdict for the plaintiff was sustained, and judgment was rendered in his favor. The defendant appeals. *Affirmed.*

*Charles S. Macomber*, for appellant.

*F. F. Kiner*, for appellee.

ROBINSON, J.—The property in controversy consists of horses, colts, cattle and harness, of the alleged aggregate value of six hundred and thirty-five dollars. The plaintiff claimed to be the unqualified owner of the property by virtue of a bill of sale thereof made to him by his son, F. R. Goodenow, on the twentieth day of August, 1891. The defendant is a constable, and claims the right to possess the property by virtue of an execution issued for the satisfaction of a judgment in favor of William Mitchell, and against F. R. Goodenow. The defendant further claims that the bill of sale on which the plaintiff relies was given for the purpose of defrauding the creditors of the son, and that it is fraudulent and void.

The evidence shows that when the bill of sale was made the property was mortgaged to two persons for the aggregate amount of five hundred and forty-seven dollars and eighteen cents, and that the son was owing his father five hundred and forty dollars. The consideration of the bill of sale was the payment of the two mortgages by the father, and the canceling of his claims against the son. The value of the property was not much in excess of six hundred dollars. Hence the father paid for it more than it was worth. At the time the bill of sale was made, both the father and son knew of the Mitchell judgment, and that an attempt was about to be made to collect it, although no levy was made under the execution until five days later. One object the parties to the bill of sale designed to accomplish by it was to prevent the seizure and forced sale of the property. They desired that as much as possible should be realized from it for the benefit of the creditors of the son. It is true

that some creditors were preferred to others, but the son had the right to make such preferences, and the father had the right to secure himself, even though, by so doing, he hindered the collection of the claims of other creditors. But there was no evidence of an intent on the part of either, father or son, to defraud, in a legal sense, any of the creditors of the latter, by executing the bill of sale. The court, therefore, properly directed a verdict for the plaintiff. Its judgment is AFFIRMED.

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P. SCHOENHOFEN BREWING COMPANY, Appellant, v.  
W. S. ARMSTRONG, Sheriff, Appellee.

89	673
108	253
89	673
106	339
89	673
144	310

- 1. Pleading: AMENDMENT FILED WITHOUT LEAVE OF COURT: WHEN STRICKEN FROM FILES.** In an action against a sheriff to recover liquors taken under a search warrant, the plaintiff alleged in his petition that the property sought to be recovered was of the value of four hundred and eight and thirty one hundredths dollars, which allegation was denied in the defendant's answer. Afterward, the liquors having been taken by the plaintiff from the possession of the defendant under a writ of replevin, and on the day the cause was set for trial, the defendant amended his answer, admitting the value of the liquors as alleged in the petition. On the same day, but after the jury was impaneled, the plaintiff, without leave of court, filed an amendment to his petition, placing the value of the liquors at one hundred and one dollars. *Held*, that it did not appear that the amendment was in furtherance of justice, and that the discretion of the district court was not abused in striking it from the files.
- 2. Replevin: PROPERTY TAKEN UNDER SEARCH WARRANT.** Replevin will not lie to recover the possession of intoxicating liquors taken by a sheriff, and held by him, by virtue of a search warrant duly issued in pursuance of the police regulations of the state.

*Appeal from Audubon District Court.*—HON. N. W. MACY, Judge.

SATURDAY, JANUARY 20, 1894.

THE defendant is the sheriff of Audubon county, in this state, and as such, by virtue of a search war-  
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rant issued by a justice of the peace, he seized and took a quantity of intoxicating liquors from the custody of John Mullen and William Burns. This is an action for the recovery of the specific personal property, and, by virtue of a writ herein issued, the liquors were taken from the custody of the defendant under allegations by the plaintiff that it is a resident corporation of the state of Illinois; that it shipped said liquors into this state from the state of Illinois in the original packages, to be sold in packages in this state by its agents, Mullen and Burns; and that it is the owner thereof, and entitled to immediate possession. The answer, by way of defense, after certain denials, states the facts as to the custody of the liquors by the defendant by virtue of the search warrant, and their being taken therefrom under process in this suit. The case was tried to a jury, resulting in a verdict for the defendant, and a judgment for the defendant for the value of the liquors. The plaintiff appeals.—*Affirmed.*

*H. U. Funk, John M. Griggs and Theo. F. Myers,*  
for appellant.

*Nash, Phelps & Green, H. M. Hanna and R. C. Carpenter,* County Attorney, for appellee.

GRANGER, C. J.—I. In the original petition, as filed, the value of the liquors was placed at four hundred and eight dollars and thirty cents. The petition was filed July 7, 1890. In the answer, filed December 17, 1890, the value, as alleged, is denied. On the seventh of March, 1891, the answer was amended, admitting the value as alleged. On the same day, after the jury was impaneled to try the issues, the plaintiff, without leave of court, filed an amendment placing the value of the liquors at one hundred and one dollars, which amendment was, on motion of the

1. PLEADING:  
amendment  
filed without  
leave of court:  
when stricken  
from files.

defendant, stricken from the files, and the action of the court in so doing is assigned as error.

Some four grounds were stated in the motion for the court's action. The first is: "That it was filed without the leave of the court first obtained." If the court would have been justified in refusing leave, if asked before filing, it was justified in striking the amendment because filed without leave, and that method of considering the question will certainly be fair to the appellant. Conceding the liberality of the rule as to amendments, they are always to be allowed in furtherance of justice. Code, section 2689. The ruling of the court must have been made in view of the facts that, when the amount was fixed in the petition originally, the plaintiff, if successful in the suit, might be required to accept a judgment for the value of the liquors, and it then very precisely stated the value as four hundred and eight dollars and thirty cents. When the plaintiff filed the amendment, the situation had so changed that, if the defendant should be successful, it might be required to pay the value of the liquors, and it then sought to change the averment as to the value, and fix it at one hundred and one dollars, "and no more." The amendment contains no statement that the averment in the original petition was made through inadvertence or mistake, and the two statements seem to have been intentionally made, and the latter just at the moment of proceeding to trial. The conclusion in the mind of the court, with such a condition of the record, is not difficult to understand, and it certainly does not appear that the amendment should have been permitted in furtherance of justice. Amendments at such a stage of the proceedings are allowed within the sound discretion of the court. *Clough v. Adams*, 71 Iowa, 17. The court is vested with a sound discretion as to striking amendments from the files. *Wyland v. Mendel*, 78 Iowa, 739. The action of the district court

in striking the amendment was not an abuse of its discretion.

II. The facts as to the liquors being taken from the defendant sheriff while in his custody, by virtue of a search warrant, appear conclusively from the record. These facts bring the case clearly within the rule announced in *Lemp v. Fullerton*, 83 Iowa, 192, and *Anheuser-Busch Brewing Ass'n v. Fullerton*, 83 Iowa, 760. It is true that in this case, at the trial in the district court, these facts were disregarded, or not noticed, and the cause was determined on other issues. In this court the appellee urges that, regardless of the errors assigned, these facts, and the law applicable thereto, control, and the case must be affirmed. The appellant urges that the cause should be here only upon the issues submitted to the jury as to which errors are assigned. Why the case was tried below without reference to this controlling question we are not informed. With the state of the record, had the attention of the court been called to it, a verdict for the defendant should have been ordered. We notice that, when the cause was tried in the district court, the case of *Lemp v. Fullerton* had not been determined in this court, and the present situation may be the result of a mutual misapprehension as to the law applicable to the facts. However that may be, such law must control in this case, and, should the case be reversed on some errors assigned, the district court must then apply the law, and enter judgment for the defendant, and the result would be a reversal because of errors not prejudicial. To our minds the question is not a doubtful one, and the judgment will stand **AFFIRMED**.

2. REPLEVIN:  
property taken  
under search  
warrant.

GEORGE BRYSON, Administrator, Appellee, v. CHICAGO,  
BURLINGTON & QUINCY RAILWAY COMPANY,  
Appellant.

1. **Railroads: PERSONAL INJURY: CONTRIBUTORY NEGLIGENCE: EVIDENCE.** Where the right of a railroad company to the use and occupation of a city street is in common with that of the public, the public use is subservient to the rights of the railroad company as to the use of its tracks in the operation of its railway. Where, therefore, a person went upon a railway track on such a highway, to the rear of a train that was standing at the depot, and started to walk in the opposite direction from that in which the train was headed, without looking to see if there was a light on the rear end of the train, and without listening for the sounding of the bell or whistle, nor paying other attention to said train, because of the belief that it was going in the opposite direction, and she was presently struck by said train backing up, and killed, *held*, that, while she was not a trespasser, she was guilty of such contributory negligence as to preclude a recovery by her estate of the railroad company for causing her death.

2. ———: ———: ———: **JUDGMENT NOTWITHSTANDING VERDICT.** The jury having found specially that the whistle was blown and bell rung before the train commenced to back up, and that the bell continued to ring as the train was backing, and answered that they were in doubt as to whether the deceased was exercising ordinary care at the time of the accident, *held*, that the defendant was entitled to a verdict on the special findings.

3. **New Trial: GROUNDS: COMPROMISE VERDICT.** A showing that the verdict in a cause is the result of a compromise; that it is reported that one of the witnesses of the opposite party was paid for testifying as he did; and of newly discovered evidence which is merely cumulative, will not entitle a party to a new trial.

*Appeal from Pottawattamie District Court.*—HON. H. E.  
DEEMER, Judge.

SATURDAY, JANUARY 20, 1894.

ACTION to recover damages for a personal injury resulting in the death of Kate Bryson. There was a verdict for the plaintiff for one dollar. From orders overruling a motion to direct a verdict for the defendant, a motion for judgment for the defendant on the

89	677
98	706
89	677
103	363
103	416
89	677
122	221
89	677
d125	72
d126	13
89	677
135	519

special findings, and from a ruling granting the plaintiff a new trial, the defendant appeals.—*Reversed.*

*Wright & Baldwin*, for appellant.

No appearance for appellee.

KINNE, J.—By virtue of an ordinance of the city of Council Bluffs, the defendant company was on January 21, 1889, occupying most of Fourth street, from a point south of the south side of Twelfth avenue to and beyond Thirteenth avenue, with its tracks and yards, and in the proper operation of its railway. The grant by the city to the defendant company, as to Fourth street, was perpetual, for “the right of way for a double track railway, with the necessary sidetracks, turnouts and switches. \* \* \* Said tracks, when constructed, to be located as near the center of said streets as may be practicable.” The ordinance also granted to the defendant company the “exclusive use and occupancy” of Twelfth avenue from Fourth street for one block west. The passenger depot of the defendant was situated near the intersection of Fourth street and Twelfth avenue. As we understand the record, the accident occurred on Fourth street, below its intersection with Twelfth avenue. On the evening of January 21, 1889, the plaintiff’s intestate, on her way home, passed the fast mail train of the defendant, which was standing at or near its passenger depot, and which was headed to the west. After passing said train, she stepped upon the track upon which it was standing, and in the rear of it, and had walked but a short distance upon said track when the train was backed, knocking her down, and so injuring her that she died as a result thereof. The particular acts of negligence charged against the defendant were: *First*, failure to have some one stationed at the rear end of said train; *second*, that no signal or warning was given for start-

ing said train by the person whose duty it was to do so; *third*, that no proper warning or signal of the starting or backing of the train was given; *fourth*, that after Kate Bryson was struck, and before she was seriously injured, her peril was discovered by the defendant's servants and employees in charge of the train, and in time to have avoided dangerous injury to her, and that said servants and employees negligently failed to stop the train, by reason whereof she received the injuries of which she died. It is also averred that deceased did not contribute to produce the injuries complained of. The defendant denied all the allegations of the answer. At the close of the plaintiff's testimony, the defendant filed a motion to direct a verdict for it on the ground that no negligence had been shown on part of the defendant, and because the evidence showed that the plaintiff's intestate was guilty of such negligence as to defeat a recovery, and that she was on the defendant's right of way as a trespasser. The motion was overruled. Certain special interrogations were submitted to the jury. They were instructed, and returned a verdict of one dollar for the plaintiff. The defendant filed a motion for judgment on the special findings, notwithstanding the general verdict, and the plaintiff filed a motion for a new trial. The court overruled the defendant's motion for judgment, and sustained the motion for a new trial. From the court's action in overruling the defendant's motion to direct a verdict, and its motion for judgment on the special findings, and from the ruling granting a new trial, the defendant appeals.

I. The appellant's first contention is that the plaintiff's intestate was a trespasser upon its tracks, and this claim seems to be based upon the thought that the exclusive use of Fourth street at the place where the accident occurred was in the defendant

1. RAILROADS:  
personal  
injury; con-  
tributory  
negligence:  
evidence.

company. We do not so read the record. From the quotations already made from the ordinance in evidence, it will be observed that the exclusive use of Twelfth avenue for a block west of Fourth street was granted to the defendant, but it appears that the accident happened at a point south of Twelfth avenue. If so, it was on Fourth street, which the defendant simply had the right to occupy and use in common with the public; such public use, of course, being subservient to the rights of the defendant company as to the use of its tracks in the operation of its railway.

We have, then, the case of an injury to one walking upon the track of the defendant company, which was laid upon a public street in the city, when the right of use of the street had not been taken from the public, except in so far as such use was inconsistent with the defendant company's paramount right to use its tracks in the operation of its trains thereon. The following further facts were established by the evidence introduced by the plaintiff: That about 6 o'clock on the evening of January 21, 1889, the decedent, accompanied by her mother, Mrs. Lash, was returning to her home, from the business part of the city; that she went upon the platform of the defendant at or near its local passenger station in said city; that both ladies walked the entire length of the depot platform; that they then saw a train of cars standing at the depot. The train was the fast mail train, and an engine was attached to the west end thereof. When they had passed the train, they stepped off of the platform onto the track on which this train stood, and in the rear of it. They had proceeded but a short distance, when the train backed against the plaintiff's intestate, knocking her down, and running over her. She died from the injuries in about an hour. The ladies thought this train was going to the transfer depot of the Union Pacific Railway Company, because

it was headed that way. They talked about that being its destination. Mrs. Lash testifies that she did not look to see if there was a light on the rear end of the train, or if there was a man there; that neither of them paid much attention to the train, as they thought it was going to the transfer, and thought they were safe; that they did not listen for the ringing of the bell or the blowing of the whistle, and she did not hear either. It appears, without conflict, that there was a light on the rear end of the train. There is a conflict in the evidence as to whether the whistle was sounded and bell rung. Several witnesses testified to the fact that people had for a long time used the track in question as a footway, and had walked alongside of the track, with the knowledge of the defendant's employees.

We are first to consider whether, in view of this testimony, the plaintiff's intestate was guilty of such negligence as to defeat a recovery. If she was, then the defendant's motion for a verdict should have been sustained. Now, to be a trespasser, the decedent must have been on the defendant's track unlawfully, without its invitation, or consent. It is true she was not walking on the defendant's invitation, nor with its consent, except as it might be implied from the fact that the track had been so used with the knowledge of the defendant's employees. But she did not need the defendant's consent. She was walking upon a public highway, wherein the public and the defendant both had a right of use. Her right to thus occupy the track was only subordinate to the right of the defendant to use it for the operation of its trains. Surely, then, she was not a trespasser. She was there rightfully.

What, then, under such circumstances, was the measure of her duty? What care was she bound to exercise, and was she guilty of negligence which contributed to her injury? It can not be doubted that the plaintiff's intestate, though rightfully on the track, as a

part of the public highway, was bound to exercise ordinary care and prudence for her own safety. She knew she was walking on a railway track. She knew, or was bound to know, that a train might move over that track at any moment. She knew that the railway company had the better right, as against her, to occupy said track in the operation of its trains. She knew that there was a train standing upon the track behind her for she had just passed it. There is nothing to show that she was not in the full possession of her faculties. Still, she made no effort to know if the train moved. She paid no attention to it, not even listening for signals of danger. She was bound to know that in using a railway track as a footpath she was subjecting herself to great danger, and her situation required that she keep a vigilant watch for approaching trains. She did not do so. She assumed, without warrant therefor, that, as the train was headed towards the crossing it was safe to walk behind it, and pay no attention to it. It is a matter of common observation, of which every one is bound to take notice, that trains are likely to move either forward or backward. It is said in *Illinois Central Railway Co. v. Hall*, 72 Ill. 222: "It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field, and he who deliberately does so will be presumed to assume the risks of the perils he may encounter. The crossing of a track of a railroad is a different thing. The one is unavoidable. But in the other case he voluntarily assumes to walk amid danger constantly imminent. \* \* \* It was shown that trains passed frequently. No prudent man would expose himself on that part of the road without keeping a constant and vigilant watch for approaching trains. The appellee did not do this. \* \* \* If a party will not exercise ordinary care for his personal safety, he ought to bear the consequences that may ensue." This doctrine was approved by the court in *McAlister v. Burlington & N. W. R'y Co.*, 64

Iowa, 395, 398. See, also, *Masser v. Chi., R. I. & P. R'y Co.*, 68 Iowa, 602; *Richards v. Chi., St. P. & K. C. R'y Co.*, 81 Iowa, 426, and cases cited.

In *Nixon v. Chi., R. I. & P. R'y Co.*, 84 Iowa, 331, 335, one attempted to cross the railway track at a crossing. He looked for a train from the south, and was struck by a train coming from the north. This court said: "The traffic and running of trains on railroads is such that there can be no excuse for a traveler to coolly and calmly approach a railroad track, and look but one way." It is apparent that, by the exercise of the slightest care by the plaintiff's intestate, she could have known of the approaching train, stepped off the track and prevented the accident. She, then, having directly contributed to the accident, no recovery can be had by the plaintiff, even though the defendant may have been negligent. There was no evidence which even tended to show that the defendant's servants in charge of the train knew of the decedent's presence on the track until after the injury was inflicted. The court should have directed a verdict for the defendant.

II. The jury, among other things, found, specially, that the whistle was blown before the train began to back up; that at and prior to the backing of the train the bell of the engine was ringing, and that it continued to ring as the train was backing; that when the train began backing there was a light on the rear end of it; that the plaintiff's intestate did not look to see if there was a light burning on the rear end of the train when it started to back towards her; that there was nothing to prevent her from seeing the light when the train stood at the platform as well as when it started to back; that there was nothing to obstruct her from seeing the train as it was backing down, if she had looked for the same; that she did not stop, look, or listen for the movements of the train. On these special findings, the defendant moved for a judgment in its favor.

<sup>2</sup> —: —: —:  
judgment not  
withstanding  
verdict.

The burden was on the plaintiff to show that his intestate was not guilty of negligence which contributed to the injury. Touching this matter, the following interrogatory was submitted: "Was plaintiff's intestate, Mrs. Bryson, exercising ordinary care and prudence for her own safety at the time she was struck by defendant's train?" which the jury answered, "In doubt, for want of evidence." Inasmuch as it was incumbent upon the plaintiff to establish the fact that his intestate did not in any way directly contribute to the injury, it is clear that if the plaintiff is to recover it must appear that his intestate was, at the time of the accident, exercising ordinary care for her own safety. The finding of the jury is, in effect, that the plaintiff has failed to establish this fact, which is essential to his recovery. It seems to us that the findings are absolutely inconsistent with the general verdict. These special findings not only show that the plaintiff's intestate was guilty of contributory negligence, but also tend strongly to show freedom from negligence on the defendant's part. The jury were properly told by the court that before they could find for the plaintiff they must find that his intestate did not, by want of ordinary care or prudence on her part, directly contribute to the injuries complained of. They did not so find, as is evident from their special findings. The plaintiff had failed, in an essential particular, to establish his case. The general verdict being in conflict with the facts specially found, it should have been set aside. *Baird v. Chi., R. I. & P. R'y Co.*, 55 Iowa, 121, 124; *Cooper v. McKee*, 53 Iowa, 239; *Ford v. Central Iowa R'y Co.*, 69 Iowa, 627.

III. The motion for a new trial should have been overruled. The alleged misconduct of the jury, in the manner in which they reached their verdict, it occurs to us, is as to a matter essentially inhering in the verdict itself.

2. New trial:  
grounds: com-  
promise ver-  
dict.

The affidavits of jurors set out in the record consist of a statement showing why they reached the verdict they did. It is not a case of a quotient verdict, or one arrived at by lot, but, at most, a claim that the verdict was the result of a compromise of conflicting opinions. It is well settled that affidavits of jurors are not receivable to impeach a verdict, by showing the motives which influenced their decision, or that they were unduly influenced by their fellow jurors. *Darrance v. Preston*, 18 Iowa, 396; *Bingham v. Foster*, 37 Iowa, 339.

Another ground of this motion was misconduct of the defendant. One Fulton swears that Mooney told him that one O'Leary, a witness for the defendant, was paid for testifying as he did. It does not appear how Mooney knew this fact, if it was a fact; but it does appear, from Fulton's own affidavit, that when Mooney told this he was intoxicated. We do not think that that sort of a showing justified the granting of a new trial.

It is said, also, that the witness Mooney was mistaken when he testified that the whistle was blown before the train backed up; that he referred to some other occasion. Even if this is so, it would not be ground for a new trial. Three witnesses for the plaintiff testified they heard no whistle. One said it was blown, while four witnesses for the defendant, besides Mooney, swear it was blown, and the jury so found. If Mooney would swear that no whistle was blown, it would simply be cumulative evidence.

Another ground for the motion for a new trial is newly discovered evidence. This relates to the blowing of the whistle and ringing of the bell. As we have already said, five witnesses, besides Mooney, swear the whistle was blown and bell rung, and three to the contrary. The newly discovered evidence was all cumulative, and in such a case it is not ground for granting a new trial. *First Nat. Bank v. Charter Oak Ins. Co.*, 40

Iowa, 572; *Morrow v. Chi., R. I. & P. R'y Co.*, 61 Iowa, 487; *Donnelly v. Burkett*, 75 Iowa, 613.

We have considered all the questions raised, and, while we are never inclined to disturb the action of the court below in granting a new trial, yet the facts in this case require us to do so. Other matters appearing in the record, and which, to our minds, further justify the conclusion we have reached, need not be considered. For the errors pointed out, the judgment below is REVERSED.

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TIM FOLEY, Administrator, Appellant, v. J. A.  
HAMILTON *et al.*, Appellees.

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120	716
89	686
124	137

1. **Bond of Executor: MISTAKE: REFORMATION: LIABILITY OF SURETIES.** The bond of the executor of the estate of O. recited that he had been by the court appointed executor "to execute his last will and testament," and was conditioned for the faithful discharge of his duties as such executor. Following the obligation of the bond, and on the same page, was the oath "as executor of the estate of O. deceased," but neither the name nor the estate of O. was elsewhere mentioned in the bond. The bond was filed with the clerk of the court, however, and treated throughout the proceedings upon said estate, as that of the executor of the estate of O. *Held*, that it appearing that the intention of the parties was to execute a bond for the benefit of the estate of O., and they having failed to express such intention through inadvertence or mistake, equity would reform the bond so as to make it conform to the intention of the parties, and that the sureties were liable upon the bond thus reformed.
2. ———: ———: ———: **EVIDENCE.** It appearing that said executor was never appointed by the court, having jurisdiction of the estate of O., to execute any other will than that of O., that he was previously appointed one of the temporary administrators of the estate of O., when the same sureties were his bondsmen, that upon the bond in controversy appeared his oath as executor of O.'s will, and that said bond was approved and filed as his bond in that estate, and that under it he was commissioned, and proceeded to administer on said estate, *held*, that, the evidence supported the finding that it was the will of O., which said executor was appointed to execute, and that the sureties intended the bond in question for him as such executor, and warranted the reformation of the bond accordingly.

*Appeal from Pottawattamie District Court.*—HON. H. E. DEEMER, Judge.

SATURDAY, JANUARY 20, 1894.

ACTION in equity to reform an executor's bond, and for judgment thereon, against J. A. Hamilton as principal, and William Phillips and John Roan as sureties. The defendants, Phillips and Roan, answered, denying generally, and specifically denying that they signed the bond sued upon, and denying that any judgment was rendered against Hamilton in favor of said estate. They allege, as an estoppel, that the plaintiff was guilty of gross laches and neglect in not collecting the claim sued upon from said Hamilton. A decree was entered dismissing the plaintiff's petition, and for costs. The plaintiff appeals.—*Reversed.*

*John P. Organ*, for appellant.

*Burke & Hewitt*, for appellees.

GIVEN, J.—We are entirely satisfied from the evidence that the will of John O'Brien, deceased, set out as an exhibit to the petition, was duly admitted to probate; that the defendant Hamilton was appointed and sworn as executor of the estate and will of John O'Brien; that he entered upon the duties of said executorship, and on final settlement was found to be in debt to said estate in the sum of one thousand, two hundred and eighty-two dollars and fifty-two cents, and for three hundred and sixty-eight dollars costs, no part of which has been paid. We are equally well satisfied that the defendants Phillips and Roan each signed the instrument sued upon, and that it was approved and filed as the bond of J. A. Hamilton as executor of the estate of John O'Brien, deceased. It is also entirely clear that the defendant Hamilton was removed from

said executorship, and that the plaintiff was duly appointed and qualified as administrator of said estate, and is qualified to prosecute this action. These conclusions being merely introductory to the real contentions, and but little disputed in argument, it is unnecessary that we set out more fully the issues and evidence concerning them. We are also of the opinion that the appellees have failed to establish their plea of estoppel.

I. The original of the bond sued upon is before us. It is upon a printed blank of one sheet, and is as follows:

“Know all men by these presents, that I, J. A. Hamilton, as principal, and John Roan and Wm. Phillips, as sureties, all of the county of Pottawattamie, in the state of Iowa, are held firmly bound unto the county aforesaid, and to all persons herein concerned, in the penal sum of eight thousand dollars, for the payment of which, well and truly to be made, we do jointly and severally bind ourselves and our lawful representatives. Witness our hands, this third day of August, A. D., 1884. The condition of the above obligation is such that, whereas, the above named J. A. Hamilton was by the court appointed executor to execute his last will and testament as aforesaid, according to the tenor and effect thereof, now, if the aforesaid J. A. Hamilton shall discharge, all and singular, his duties as executor, and at all times render a true account of his doings in the above premises whenever thereto required by law, and do all things which are, or may be, hereafter required of him by law, then these presents to be void, and otherwise to be and remain in full force and virtue in law. In witness whereof we have hereunto set our hands and seal, the date above written.

“J. A. HAMILTON,

“JOHN ROAN AND

“WM. PHILLIPS.”

1. Bond of executor: mistake: reformation: liability of sureties.

Following this, and upon the same page, is the oath of office, subscribed by J. A. Hamilton, September 3, 1884, as executor of the estate "of John O'Brien, deceased." Upon the opposite side of the sheet is the affidavit of the appellees, made September 5, 1884, wherein they justify as sureties, and, immediately following this, the clerk's indorsement, September 8, 1884, approving and filing the bond. This bond was filed, and treated throughout, as the bond of J. A. Hamilton, executor of the estate of John O'Brien, deceased.

It will be observed that this bond recites that J. A. Hamilton was "appointed executor to execute his last will," and that it is conditioned that he "shall discharge, all and singular, his duties as executor," and that neither the name nor the estate of John O'Brien is mentioned in the bond, or in any part of the instrument except in the oath of office. The plaintiff asks a decree correcting and reforming this bond "by inserting therein the estate of John O'Brien as the beneficiary of said bond, and by inserting in the condition of said bond the name of John O'Brien as the one of whose will the defendant J. A. Hamilton was appointed executor," and for judgment thereon. The appellees cite authorities announcing the familiar rule that the liability of sureties will not be extended by implication, and that they have a right to stand upon the very terms of their contract. It is contended that we may not inquire beyond the face of the bond, and, as it fails to show upon its face that it is for the benefit of the estate of John O'Brien, deceased, the plaintiff is not entitled to recover thereon, and a court of equity has no power to reform it.

The rule stated is unquestionably the law. Courts may only enforce contracts as the parties make them; they can not be altered, added to, or taken from. . But, this does not bar inquiry as to what the contract really is. When the contract is ascertained, then the rule

applies, and the contract, as ascertained, is enforced. In *Field v. Schricher*, 14 Iowa, 122, a case in some respects similar to this, the law is stated as follows: "And while it is true, as claimed by appellants, that in construing a paper we are to look to the paper itself, and can not look to surrounding circumstances, 'to make that uncertain which is plain,' it is equally true that what a contract means is a question of law,—that, in giving it a construction, the first point is to ascertain what the parties meant. In arriving at this meaning, a few leading rules have been established, which may be stated. The subject-matter of the contract is to be fully considered. Equally important is it to know the situation of the parties and of the property, as also the purpose of the parties in making the contract, 'for the purpose and intention will be carried into effect, so far as the rules of language and law will permit.'" See, also, *Pilmer v. Bank*, 16 Iowa, 321; *Karmuller v. Krotz*, 18 Iowa, 352. It is manifest that there is a mistake in the recitation of this bond. It is legally impossible that Mr. Hamilton should have been appointed to execute his own will. It is equally manifest that his appointment was to execute the will of some other person, and that this bond was given to secure the performance of that duty. There is no mistake in the subject-matter of the bond, but in the terms by which the parties undertook to express their agreement. The rule as to reformation of written instruments is well stated in 20 Am. and Eng. Encyclopedia of Law, 713, as follows: "When an agreement is made, and reduced to writing, but through mistake, inadvertence, or fraud, the writing fails to express correctly the contract really made, a court of equity will reform the instrument in conformity with the real intention of the parties." See, also, *Carey v. Gunnison*, 65 Iowa, 702. It can not be doubted but that the real intention of the parties to this bond was to obli-

gate themselves to the county, and to all persons concerned in the will which Mr. Hamilton was in fact appointed to execute, and that through inadvertence and mistake, it was named as his will. In correcting this mistake in the bond, and making it express correctly the real intention of the parties, we do not make a contract for them, but simply ascertain that which they made. Sureties are as much bound by their contracts as are their principals, and we know of no reason why the same rules may not be observed in ascertaining what their contracts are, as are applied to other persons. Our conclusion is, that at the suit of the proper party, a court of equity may reform this bond so as to make it show the correct name of the person whose will Mr. Hamilton was appointed to execute. With this correction, the bond stands conditioned for the security of that estate. The recent case of *Neininger v. State*, 34 N. E. Rep. (Ohio) 633, is, in principle, identical with this case, and fully supports the conclusions we have announced.

II. It only remains to inquire whether it was the will of John O'Brien that Mr. Hamilton was appointed  
2. —; —. —; to execute, and whether the appellees  
evidence. understood and intended that this bond was for him as such executor. Upon these subjects the evidence leaves no room for doubt. Hamilton was never appointed by that court to execute any other will. He was previously appointed as one of the temporary administrators of O'Brien's estate, and the appellees were his bondsmen. Upon this bond is his oath as executor of John O'Brien's will. It is the only bond he gave as such executor. It was approved and filed as his bond in that estate, and under it he was commissioned, and proceeded to administer on the estate. The appellees must have understood and intended it as Hamilton's bond as executor of O'Brien's estate, from what had preceded, and from his official oath, that was

on the bond when they justified as sureties. We do not forget that to warrant a reformation of this bond the evidence must be clear and convincing. Such is the evidence before us, and we think clearly entitled the plaintiff to a reformation of the bond, and to judgment thereon as prayed.

The decree of the district court is REVERSED.

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e127 507

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ROSENBAUM BROS., Appellees, v. A. A. HORTON,  
Appellant.

1. **Partnership: NOTICE OF DISSOLUTION: RIGHTS OF CREDITORS.** K., the successor of a copartnership engaged in the banking business, of which H. was a member, having received several car loads of flax and oats as security for a claim due the bank, shipped the same to the plaintiff firm, and drew upon it for the value thereof. The transaction was an unusual one with the bank, but was necessary as a means of security, and a letter of advice written by K. to the plaintiffs, and signed by him as cashier, stated that the property was taken for a debt. No notice of the retirement of H. from the bank was published in the papers, nor was any notice sent to the plaintiff, but no drafts had ever been drawn on the plaintiff by the bank, or by either of its proprietors, while H. was a member of the firm. After K. succeeded to the ownership of the bank he conducted its business under the same names that had been used by the partnership, and in correspondence with the plaintiff used stationery that had been prepared for his predecessors, and upon which their names appeared, although over those names was stamped K.'s name as cashier. *Held*, in an action by the plaintiffs to recover the amount of an overdraft on account of said shipments, that the unusual character of the transaction, and the stamping of K.'s name over that of the former proprietors on the stationery, was not sufficient to charge the plaintiffs with notice of the change of the ownership of the bank, and that H. was liable to the plaintiff as one of the proprietors thereof.
2. ———: ———: **INSTRUCTIONS TO JURY.** The fact that the instructions in such case excluded from the consideration of the jury circumstances which should have caused a reasonably prudent person to make investigation which would have disclosed the facts in regard to the ownership of the bank, *held*, not to be prejudicial, as there were no circumstances of that kind shown by the evidence.

3. **Practice in Supreme Court: AMENDED ABSTRACT: DELAY IN FILING.** An amended abstract, filed by appellee, will not be stricken from the files, because of its not having been filed within the time required by the rules of the supreme court, when no prejudice has resulted to the appellant.

*Appeal from Calhoun District Court.*—HON. GEORGE W. PAINE, Judge.

SATURDAY, JANUARY 20, 1894.

ACTION at law to recover an amount due the plaintiff on account of money advanced on drafts for which the defendants, the Pomeroy Exchange Bank, F. A. Kenyon, F. L. Kenyon and A. A. Horton are alleged to be liable. F. A. Kenyon did not enter an appearance, and a default was entered against him. The defendants F. L. Kenyon and A. A. Horton filed separate answers, and there was a trial by jury, which resulted in a verdict against both F. L. Kenyon and Horton for seven hundred and nineteen dollars and ninety cents. Judgment was rendered against them for that amount and costs. The defendant Horton appeals.—*Affirmed.*

*R. M. Wright*, for appellant.

*Cole, McVey & Cheshire*, for appellees.

ROBINSON, J.—For some years before August, 1890, a copartnership known as Rosenbaum Brothers was engaged in the commission business at Chicago. On the first day of that month the copartners and some of their employees organized a corporation under the same name, which succeeded to the business of the firm, and is the plaintiff. During several years prior to April, 1888, the defendant Horton was engaged in dealing in lumber, coal, grains and hay at Pomeroy, and at times shipped grain and hay to Rosenbaum Brothers. In the month last named Horton and one R. C. Brownell, as

copartners under the name of Brownell & Horton, purchased of Gould & Moody a banking business which had been carried on in the name of the Pomeroy Exchange Bank. That name was retained by Brownell & Horton, who carried on the business under it, and in their own names, until the latter part of the year, when Brownell sold his interest in the bank to the defendant F. L. Kenyon. He and Horton became copartners under the name of Horton & Company, and afterwards under the name of Horton & Kenyon, and carried on the banking business in those names and in the name of the Pomeroy Exchange Bank, until the first day of September, 1890. On that date Horton sold his interest in the bank to the defendant F. A. Kenyon, who had, since the first of the year, been employed by the firm to assist in its business. The agreement of sale was made in writing, and provided that no change in the firm name should be made until the first day of the next month. At about the same time F. A. Kenyon purchased the interest of his father, F. L. Kenyon, and became the sole owner of the bank. Prior to the first day of September, 1890, no drafts were drawn on the plaintiff by the Pomeroy Exchange Bank nor by its owners. During the month of December, F. A. Kenyon shipped to the plaintiff several car loads of flax seed and oats, and drew on it drafts to the amount of three thousand dollars, which were paid. The amount of the drafts exceeded the proceeds of the shipments by about seven hundred dollars, and this action was brought to recover that excess.

I. It appears, without material conflict in the evidence, that Horton was not interested in the bank when the drafts in question were drawn, and that, as between himself and F. A. Kenyon, he was not in any manner liable for their payment. He insists that the court

1. PARTNERSHIP:  
notice of dis-  
solution:  
rights of  
creditors.

erred in not directing a verdict in his favor. The plaintiff contends, however, that it paid the drafts under the belief that he was one of the owners of the bank, without any knowledge that he had transferred his interest in it, and without any notice which would charge it with such knowledge. He admits that he did not give any newspaper notice of the transfer of his interest, but contends that he informed persons in Pomeroy of the fact; that he caused to be printed and circulated business cards, which gave notice of it; that the transaction in which the drafts were drawn was not within the scope of the business the bank had carried on while he was connected with it; and that the plaintiff knew from the character of the transaction, the correspondence it had with F. A. Kenyon, the stationery he used, and other sources of information, of facts which charged it with knowledge of the change in the ownership of the bank.

There is some claim made by the appellee that the firm of Horton & Kenyon was engaged in the business of dealing regularly in grain. Their books show a grain account, and that money of the bank was paid out for grain. But we are satisfied that Horton alone was concerned in the grain business, and that the money paid for grain was for his benefit. The flax seed and oats shipped to the plaintiff were obtained by the bank of Smith & Son in the following manner: They owed a machine company about seven hundred dollars, and the bank about nine hundred dollars. The bank had guaranteed the payment of the claim of the machine company, and the flax seed and oats were taken to apply in payment of the two claims. The transaction was not a usual one with the bank, but was necessary for it to secure its claim and the claim of the machine company. It does not require any argument to show, that the bank was authorized to secure itself against loss by taking the property in question, and that it had

the right to ship it to Chicago for sale, even though such a proceeding was not within the ordinary scope of its business, and was unusual. If it be claimed that the transaction was so unusual that the plaintiff, in the exercise of ordinary caution, should have inquired in regard to it, the answer is that, if such inquiry had been made, it would have disclosed the fact that the flax seed and oats were properly taken in the transaction of the ordinary business of the bank. In fact, the letter of advice in regard to the shipments was signed by F. A. Kenyon as cashier, and stated that the property shipped, and to be shipped, was taken on account of a debt.

F. A. Kenyon, after he acquired the ownership of the bank, conducted its business under the names Pomeroy Exchange Bank and Horton & Kenyon, and, in his correspondence with the plaintiff, used stationery prepared for his predecessors, on which those names were printed. It is true that over those names were stamped the words, "F. A. Kenyon, Cashier." One of the drafts was signed by him, without the addition of the word "cashier," and at least one of the shipments was made in his own name, but he informed the plaintiff that all shipments were for the bank, and that he intended to sign the drafts as cashier; and, relying upon those statements, the plaintiff kept its account in the name of Pomeroy Exchange Bank. Had the plaintiff inquired in regard to the stamping on the letter heads, it would have learned that F. A. Kenyon was in fact the cashier of the bank; and further inquiry would have developed the fact that the drafts and shipments were all on account of the bank. There was nothing in any of the circumstances on which Horton relies to charge the plaintiff with notice of the change in the ownership of the bank which should be treated as having that effect. He does not claim that he sent any notice of the change to the

plaintiff, but testified that he notified an agent of the plaintiff of it. His testimony in that regard is contradicted by the agent, and the jury found specially that he did not give any notice to the agent, and that none was published or sent to the plaintiff. That finding has so much support in the evidence that we can not disturb it. The fact appears to be that Horton and others were planning to organize a new bank to succeed F. A. Kenyon on the first day of January, 1891, of which Horton was to be president; and it is probable that, for that reason, he failed to give the notice of his retirement from the bank, which ordinary prudence and business usage would have dictated. However that may be, we find nothing in the record which, in view of the finding of the jury, can be regarded as evidence that the plaintiff had either actual or constructive notice of the change in the bank.

II. The appellant objects to certain paragraphs of the charge to the jury on the ground that they adopt too rigid a rule in regard to such notice, excluding from the consideration of the jury circumstances which should have caused a reasonably prudent person to make an investigation which would have disclosed the facts in regard to the ownership of the bank. But, if it be conceded that the portions of the charge so objected to are not accurate as general statements of the law, we think they could not have been prejudiced in this case, for the reason that there were no circumstances of that kind shown by the evidence.

III. The appellant has discussed at length numerous questions, which we do not find it necessary to mention in detail. Some are disposed of by what we have already said, others are immaterial to a decision of the case, and others are not founded upon proper exceptions.

2. —: —:  
instructions  
to jury.

3. PRACTICE in  
supreme court:  
amended ab-  
stract: delay  
in filing.

A motion to strike an additional abstract because not served and filed within the time required by the rule in regard to such abstracts will be overruled, for the reason that no prejudice to the appellant from the delay is shown.

A motion of the appellee to dismiss the appeal in view of the conclusion reached on the merits we find unnecessary to determine. It is sufficient to say that we have examined the entire record with that care which the importance of the questions involved demands, and find no error prejudicial to the appellant.

The judgment of the district court is **AFFIRMED**.

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**EASTERN GRANITE COMPANY, Appellee, v. AGATHA  
HEIM et al., Appellant.**

1. **Venue:** COUNTY WHERE CONTRACT IS TO BE PERFORMED. The right to maintain an action upon a contract in the county where the contract is by its terms to be performed is not affected by an allegation in the petition excusing complete performance of the contract by the plaintiff because of some default of the defendant.
2. **SALES: REPRESENTATIONS: FRAUD.** Representations by a vendor which amount to mere words of commendation of the thing sold, though false, do not amount to such fraud as will entitle the vendee to avoid the sale.
3. ———: **ACTION FOR PRICE: PERFORMANCE BY VENDOR.** A contract for the sale of a monument provided that there should be an inscription on the die, "including four lines of verse," which were not specified in the contract. *Held*, that it was the duty of the vendees to furnish such inscription, and that they could not, by refusing to furnish the same, defeat an action for the price. In such case the vendor is entitled to recover the purchase price, less the cost of making the inscription.
4. ———: ———: ———. It being provided in said contract that the inscription should be in German, *held*, that the vendor was properly permitted to prove that it is usual to use the latin letter in German inscriptions on granite monuments.

*Appeal from Cedar Rapids Superior Court.*—HON. JOHN T. STONEMAN, Judge.

SATURDAY, JANUARY 20, 1894.

ACTION at law to recover upon a written contract for the erection of a monument in a cemetery. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendants appeal.—*Affirmed.*

*Longueville & McCarthy*, for appellants.

*Cooper & Crissman*, for appellee.

ROTHROCK, J.—I. The petition was in three counts. In the first count recovery was demanded for the amount due on the written contract; the second count was upon the same cause of action, but demanded judgment for the sum named in the contract, as “the reasonable price and value of the monument;” and the third count was on the same cause of action, and judgment was asked therein for damages for the alleged breach of the contract. The written contract, upon which this suit was brought, was in these words:

“Eastern Granite Company, Dealers in Foreign and American Granite. Address: Cedar Rapids, Iowa. Three hundred and ninety dollars. Dubuque, Iowa, May 27, 1890. In consideration of three hundred and ninety dollars and other considerations, I have this day bought of the Eastern Granite Co. a granite monument from design ‘Hall Draped Urn.’ Material to be of the best quality of Barre granite, of the following dimensions and descriptions: Ground base to be in proportion. Die, 1-4x1-4. Total height, eight feet. The other parts of the monument to be in proper proportion, and to be made and finished just like design. Inscription on die: ‘John Heim, born

1. VENUE: county where contract is to be performed.

Aug. 1st, 1839; died April 3rd, 1890;’ including four lines of verse. Inscriptions all in German. Said work to be erected of first class material, and in workman-like manner; to include family name in raised letters, on second base, and inscription in sunk letters, on die; and to be delivered and set up on good and sufficient foundation. Said foundation to be put in by Eastern Granite Co., in German Catholic Cemetery, at Dubuque, on or before the fifteenth day of September, 1890, or within a reasonable time thereafter. And, when said monument is erected and set up as above specified, the said Mrs. Heim and son agree to pay to the said Eastern Granite Company, or order, at Cedar Rapids, Iowa, the sum of three hundred and ninety dollars, with ten per cent. interest on same from date of erection till paid; but, at the option of the holder hereof, they may accept, for a part or all of said sum, bankable paper, with ten per cent. interest from date till paid. It is further expressly agreed and understood by and between the parties hereto, and it is hereby made a part of the consideration of this contract, that the title, ownership, and right to possession shall not pass from the holder hereof until this contract is fully paid; and if this contract is not fully paid at maturity, time being the essence of the contract, the holder hereof may, upon canceling and surrendering this contract to the maker, and without other notice, take possession of and remove said monument from said cemetery. No agreement made by the agent will be recognized by the said company unless reduced to writing, on the face of this contract. No countermands or rescissions will be recognized. John Heim, Jr. Agatha Heim. Eastern Granite Company. Per G. Sundell, Gen. Agent.”

The defendant presented a motion to the court to strike out the second and third counts of the petition, because the defendants were residents of Dubuque

county, and the said counts could not be joined with the first count, and the defendants could not be held to answer to the second and third counts in Linn county, as they demanded a judgment for refusal to perform the contract and for damages. The motion was overruled. This is the first ground of objection to the rulings of the court in the trial of the case. The objection demands but very brief consideration. It is possible that the petition was vulnerable to an objection that it set out the cause of action in three counts, when there should have been but one. All three of these counts were founded upon the written contract. The contract expressly provided that the agreed price of the monument should be paid at Cedar Rapids, and, under section 2581 of the Code, action for the price was properly brought in Linn county. The fact that it was alleged in the petition that the defendants failed to furnish or designate the lettering or verse, or a copy thereof, to be inscribed on the monument, in no manner controlled the venue of the action.

II. The defendants, in their answer to the petition, sought to avoid the enforcement of the contract, on the ground that the agent of the plaintiff, who procured the writing to be made, induced the defendants to enter into the same by means of certain false and fraudulent representations, which were set out at length. The defendants complain because the court sustained a motion in behalf of the plaintiff to strike from the answer the alleged fraudulent representations. A careful examination of these averments, in connection with the arguments of counsel, leads us to the conclusion that the ruling of the court was correct. It is unnecessary to set out these alleged fraudulent representations. When all are taken together, they do not constitute such false representations as may be set up as a defense to an action.

2. SALES: representations: fraud.

They are mere words of commendation, or puffing, or what is sometimes called "trade talk."

III. So far as the record before us shows, the plaintiff erected the monument in all respects as specified in the contract, except inscribing a verse or text thereon. The court permitted the plaintiff to prove that the said inscription was not made because the defendants failed to furnish copy for it; and the jury was instructed that it was the duty of the defendants to furnish the inscription, so that it could be placed on the monument, and that, if the defendants failed or refused to furnish the verse, it was the right of the plaintiff to erect the monument without the inscription, and that, under that state of facts, the plaintiff would be entitled to recover the contract price, less the cost of inscribing a verse of ordinary length upon the monument.

It is claimed by counsel for appellants that the contract did not make it the duty of the defendants to furnish the inscription. The contract should be construed in a reasonable manner. Of course, the defendants were to determine that question. The plaintiff had no right to do so. And the contract could not be annulled or rescinded by the mere failure to furnish the inscription. The defendants can not be allowed to use their own default as a reason why the contract should not be performed. The evidence on the trial showed that the sum of ten dollars would be full compensation for inscribing an ordinary verse on the monument, and the jury, by their verdict, deducted that amount from the contract price. The defendants claim that the rule adopted by the court is in conflict with the case of *Scale Co. v. Beed*, 52 Iowa, 307. The facts of that case involve an entirely different principle, and the case is so clearly distinguishable from this case that we do not think it necessary to consider the question further.

IV. It will be observed that the contract provided that the inscription on the monument should all be in German. That part of the inscription  
4. —: —: —. which the plaintiff placed on the granite was in German words, but in the Latin letter. It is claimed that this is not in compliance with the contract; but the court, as we think, correctly permitted the plaintiff to prove that it was usual to use the Latin letter in German inscriptions on granite monuments.

V. Numerous other objections to rulings of the court are presented in argument, which we do not think of sufficient importance to require separate consideration or special mention. A full consideration of the whole record shows that the case was fairly tried, and that a just result was attained. The whole defense appears to us to be an assault upon a valid contract, which was fully performed by the plaintiff, except in the immaterial matter of part of the inscription, which was not made because the defendants did not furnish the words they desired to be placed upon the monument. The judgment of the superior court is **AFFIRMED**.

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J. A. HARVEY, Appellant, v. W. M. MCFARLAND,  
Secretary of State, Appellee.

**Mandamus:** PUBLIC OFFICERS: ACTS WITHOUT THE SCOPE OF OFFICE.

*Mandamus* will not lie to compel the secretary of state to furnish on application a copy of an alleged amendment to the state constitution, and certify the same to be a part of said constitution, notwithstanding the decision of the supreme court that such amendment was not legally adopted.

*Appeal from Polk District Court.*—HON. W. F. CONRAD,  
Judge.

MONDAY, JANUARY 22, 1894.

THIS is an action of *mandamus* to compel the defendant, who is secretary of state, to furnish the plaintiff with a certified copy of the constitution of the state, and to include in said copy an alleged amendment to the constitution, which it is claimed was adopted, and made part of that instrument, in the year 1882. The defendant refused to certify the alleged amendment as part of the constitution. A trial was had in the district court, and the application for a writ of *mandamus* was refused, and the plaintiff appeals.

*A. J. Baker, Nourse & Nourse, and J. A. Harvey,*  
for appellant.

*Cole, McVey & Cheshire and W. M. McFarland,*  
for appellee.

ROTHROCK, J.—It will be understood that the matter of contention involves the validity of what was at one time known as the "Prohibitory Amendment to the Constitution," and which this court determined in the case of "*Koehler v. Hill*, 60 Iowa, 543, was not a part of the constitution, because it was not legally adopted. The object and purpose for making the demand of the defendant for a certified copy of the constitution is stated in the petition in the following language:

"Plaintiff further states that the Iowa State Temperance Alliance is a corporation existing under the laws of the state of Iowa; that one object of said corporation is to disseminate among the people of the state temperance literature, and information as to the laws for the suppression of intemperance; that to that end said corporation, at its annual meeting in March, 1891, resolved to have compiled and published, for distribution among the people, all the constitutional and statutory provisions in force in the state of Iowa relating to the sale of intoxicating liquors, and that

plaintiff has been employed, for a compensation to be paid him, to compile said constitution and laws touching said subject, and to annotate the same in such manner as to impart verity thereto; that said amendment, being a part of the constitution of the state of Iowa, became, and is, a necessary part of such publication; that the same is on file and of record in the office of the secretary of state, of the state of Iowa; that the defendant is such secretary of state; and the legal custodian thereof, and of the proclamation of the governor declaring the same to be a part of the constitution, and that the defendant, as such secretary, is authorized to so certify, and under the law it is his duty to so certify, when requested by a citizen of the state, and his fee for so doing tendered him; that in no other way can it be made to appear authoritatively, in the compilation which the plaintiff has, as aforesaid, been employed to prepare, that said provision is a part of the constitution of the state of Iowa. The plaintiff further states that prior to the commencement of this action, he applied to the defendant, as such secretary of state, for a certified copy of the constitution so as aforesaid amended; that he made a demand of him for such certification of the constitution, including all the amendments thereto, but that he refused, and still refuses, to insert therein, or include and certify as a part of said constitution, the said section 26 of article 1 of said constitution, assuming, claiming and pretending, as a reason therefor, and in justification of his refusal, that said section 26 is not a part of the constitution of the state of Iowa. Plaintiff says that by reason of such refusal by the defendant he (the plaintiff) is hindered and prevented from performing and fulfilling his said contract with the Iowa State Temperance Alliance, and is damaged, and may suffer further damage, by reason of said refusal. And plaintiff says that he has no other plain, speedy or adequate

remedy, and therefore he brings this action, and prays the court to grant a peremptory writ of *mandamus*, commanding the defendant, as such secretary of state, to forthwith give to the plaintiff a duly and properly certified copy of the constitution of the state of Iowa, as amended, including section 26 of article 1 thereof, so as aforesaid proposed, referred, agreed to and submitted, and ratified by the people at said special election on the twenty-seventh day of June, 1882, and that he may recover his costs herein expended."

The ground upon which the defendant refused to comply with the demand of the plaintiff is stated in the answer in these words: "The defendant also admits that he refused to so certify said amendment in manner and form as demanded by the plaintiff, and for the reason that the supreme court of the state of Iowa has heretofore adjudged and decided that the same was not legally adopted, and made a part of the constitution of the state of Iowa."

It will be observed that the defendant did not refuse to make a copy of the alleged amendment and certify that it was a copy of a public record in his office, without determining its legal effect. The plaintiff demanded more than this. He insisted in the court below, and claims now, that it was the duty of the defendant to certify the amendment as part of the constitution of the state, notwithstanding it had been decided by this court that the same was no part of the constitution. It quite plainly appears from the whole record in the case that the object in making the demand was to review, and again present, the question of the validity of the so-called "amendment" in the courts. The plaintiff, in quite a voluminous printed argument in this court, presents the whole controversy anew. At the very outset of the argument, it is stated that the issue made by the defendant "brings anew before the court the question whether section 26 of

article 1 [the prohibitory amendment], is part of the constitution."

It is provided by section 3706 of the Code that "every officer having the custody of a public record or writing is bound to give any person on demand a certified copy thereof on payment of the legal fees therefor." It may be that under this section of the statute the defendant can be required to certify a copy of any record in his office, and identify it. But that is a mere ministerial act. He can not be compelled to decide as to the legal effect of any of the records in his custody. The defendant is just as much bound by the decision of this court that the alleged amendment was not legally adopted as any other public officer or citizen of the state. The plaintiff, in effect, demanded that the defendant should determine that the said amendment was in force, notwithstanding the decision of this court. It is so plain as to require no argument that a mere ministerial officer is clothed with no such authority. But suppose that the defendant had complied with the plaintiff's request. His decision would have been an attempt to overrule a solemn adjudication of the highest court in the state, and would have been of no possible advantage to the plaintiff, or to the Alliance which he represents. It is true he could have published it, and circulated it among the people of the state, claiming it was part of the constitution, but that act would not make it part of the constitution, and it would have no effect, except, possibly, to deceive some of them, and lead them to believe that the said amendment was legally adopted. These observations, it appears to us, demonstrate that the plaintiff had no right to require such a certificate as he demanded, and that this action of *mandamus* can not be maintained.

The judgment of the district court is **AFFIRMED**.

B. L. MANWELL, Appellee, v. BURLINGTON, CEDAR RAPIDS  
& NORTHERN RAILWAY COMPANY, Appellant.

1. **Pleading: ANSWERING AFTER DEMURRER: WAIVER OF ERRORS.** The right to a review, in the supreme court, of errors committed by the district court in overruling a demurrer to the plaintiff's petition is waived by the filing of an answer.
2. ———: **FAILURE TO ATTACK DEFECTIVE PETITION: WAIVER.** Although a petition be so defective as not to present a cause of action, if its sufficiency is not attacked by demurrer, its defects will be deemed waived, and the plaintiff will be entitled to recover upon proof of the facts alleged.

*Appeal from Benton District Court.*—HON. L. G.  
KINNE, Judge.

MONDAY, JANUARY 22, 1894.

ACTION for damages to the plaintiff's team on the defendant's right of way. There was a judgment for the plaintiff, and the defendant appeals.—*Affirmed.*

*J. C. Leonard and S. K. Tracy*, for appellant.

*E. M. Sharon*, for appellee.

GRANGER, C. J.—This case was once before in this court, and is reported in 80 Iowa, 662. On that appeal some questions were determined that affect the consideration of the case at this time, the issues on the two appeals being the same. The pleading for the plaintiff, on which issue was joined, is a substituted petition. The principal facts alleged are that the plaintiff was the owner of a pair of mares running at large, which escaped onto the right of way of the defendant through an open gate in the fence inclosing the right of way, and while there they were frightened by a passing train, and ran into a barbed wire fence along the

right of way, and were injured. The particular acts of the defendant on which recovery is sought, and the only ones, are that it "neglected to close said gate, and failed to maintain a fence, as required by section 1289" of the Code.

I. At the last trial in the district court the cause was submitted to the court without a jury, upon a stipulation for a finding of facts and conclusions of law. Many of these conclusions, in view of the questions argued and our conclusions, are not important to be set

1. PLEADING: answering after demurrer: waiver of errors.

out. The following are among the findings of fact: "*Second*, that, at the place where the plaintiff's horses entered the defendant's right of way, it had the right to fence its right of way, and had fenced it; *third*, that said horses of the plaintiff entered said right of way through a gate which had been left open by some one unknown; *fourth*, that said horses were running at large, and not under the control of the owner, at the time they entered on said right of way, and escaped thereon through and by reason of said open gate; *fifth*, that, while on said right of way, one of the defendant's trains of cars frightened them, by reason of which fright said horses ran into a barbed wire fence which inclosed said right of way." As a conclusion of law, the court found the defendant liable.

It will be well to next notice the condition of the record as to the formation of the issues. To the substituted petition there was a demurrer upon two grounds, the court sustaining it as to the first, and overruling it as to the second. This was followed by a motion to strike from the petition, which was overruled, and this by another demurrer, which was also overruled. The defendant then took issue by answer, after which came the stipulation and trial. The defendant now urges, in argument, that the district court erred in its rulings on both demurrers

and the motion to strike. The questions presented can not be considered. If there were errors in the ruling referred to, they were waived by the filing of an answer. Of the many holdings to this effect, we will cite but a few. See *Mann v. Taylor*, 78 Iowa, 355; *Ida Co. v. Woods*, 79 Iowa, 148; *Randolf v. Town of Bloomfield*, 77 Iowa, 50; *Pumphrey v. Walker*, 71 Iowa, 383; *Westphal v. Henney*, 49 Iowa, 542; *Tootle v. Phoenix Insurance Co.*, 62 Iowa, 362; *Smith v. Powell*, 55 Iowa, 215.

II. The defendant quotes the second and third findings of fact, and urges that their legal effect is to entitle it to a reversal, and an order for a judgment in its favor. The argument then deals with the sufficiency of the petition in not pleading facts showing negligence or a want of fence. It should be understood that, with the condition of the record, we do not go to the petition to know if it states a cause of action, for wherein it may be defective in that respect the defect is waived by a failure to test its sufficiency by demurrer. These particular objections to the petition were not presented in the demurrers referred to in the other division of the opinion, and, if it should be conceded that they constitute material defects, they must now be treated as waived, and the petition as stating, for the purposes of the case, a cause of action. *Frentress v. Mobley*, 10 Iowa, 450. In that case it is said: "The defendant, having taken issue upon the allegations of the petition, admitted thereby that they constituted a cause of action." It has been repeatedly held that defects in a pleading are waived by a failure to attack the same by motion or demurrer. See *Brockert v. Cent. Ia. Railway Co.*, 82 Iowa, 370, as directly in point; and *Linden v. Green*, 81 Iowa, 365.

It is to be understood, then, that a recovery could be had on the averments of the petition if sustained by the proofs. To waive the pleading of a material fact

2. —: failure to  
attack defect-  
ive petition:  
waiver.

is to consent that it need not be established as a condition precedent to a right of recovery. As we have said, the only facts pleaded against the defendant are that it neglected to close the gate, and failed to maintain a fence. The court, in its findings, adhered to the issues, and found that it had fenced its line, and that a gate therein had been left open by "some one unknown," through which the horses entered onto the right of way. The court must have found the defendant liable because of a neglect to close the gate after it was, by some one, left open, and that is the precise ground upon which recovery was sought. It is not for us to say whether or not, in law, it is sufficient, as we are urged to do, for it is now too late to present the question. The defect, if any, is waived. The evidence is not in the record, and we assume the facts, as found, to have support. Under the issues, if it appeared that the horses were injured because of the defendant's neglect to close the gate, it became liable. The pleadings concede an obligation on the part of the defendant to look after the gate, or, in other words, they admit its liability for a neglect to close it. The trial was to determine the fact. The district court, in its conclusions of law, omits any finding as to legal liability of the defendant to keep the gate closed, treating it as a proposition not involved in the case under the issues. In fact, the proposition does not seem to have been one of contention in the district court. Under the issues and the facts as found, the defendant was clearly liable. The proposition of the liability of the defendant for a neglect to close the gate is more elaborately argued under an assignment of error in the refusal of the court to sustain a motion to vacate its judgment. The foregoing considerations are decisive of that branch of the argument, and it calls for no further attention.

The judgment is **AFFIRMED**.



## SUPPLEMENT.

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89 713  
95 480

### SHAW & SCHOONOVER, Appellees, v. JOHN JACOBS, Appellant.

1. **Bank Checks: INDORSEMENT IN BLANK: EFFECT OF: CUSTOM.** Where a check upon a bank, drawn in favor of a payee named or bearer, was indorsed in blank by the payee, and delivered by him to the bank where he did business, which gave him credit therefor, *held*, that the title to the check passed to the bank, according to the law merchant, and that evidence to the effect that it is the custom of bankers, when a check is drawn upon one bank and presented to another, to give credit for the check, but that such credit is treated as a receipt merely, and not as payment, is not admissible to negative the ownership of the check by the bank receiving it.
2. ———: **SIGNATURE OF INDORSER: GENUINENESS: EVIDENCE.** In an action upon a check by the indorsee of the payee against the drawer, evidence as to the genuineness of the signature of the payee in the indorsement is properly excluded, where the payee has not denied the genuineness of his signature in writing, under oath, as provided by section 2730 of the Code.
3. **Sales: FRAUD: EVIDENCE.** In an action upon a check given for hogs, it was shown that the payee warranted the hogs to be sound, but that some of them died soon after their removal from the payee's yard to that of the drawer. It was not shown that the hogs were infected when sold, nor of what disease they died, nor that the payee knew that the hogs were diseased at the time of the sale. *Held*, that there was no evidence to submit to the jury upon the question of fraud in the sale of the hogs.

#### UPON REHEARING.

**Pleading: GENUINENESS OF SIGNATURE TO WRITTEN INSTRUMENT: EVIDENCE.** The genuineness of a signature to a written instrument may be put in issue by a denial, under oath, by a party other than the person whose signature it purports to be, and the burden of proof as to such issue will be upon the party making the denial.

(713)

*Appeal from Jones District Court.*—HON. J. H. PRESTON, Judge.

TUESDAY, MAY 23, 1893.

ACTION to recover the amount of a check drawn by the defendant. After the evidence on the part of the defendant had been submitted, the court directed a verdict for the plaintiffs, and rendered judgment for the amount of the verdict, which was returned as ordered. The defendant appeals.—*Affirmed.*

*Sheean & McCarn* and *M. W. Herrick*, for appellant.

*Remley & Eranbrach*, for appellees.

ROBINSON, C. J.—The check upon which this action is founded is as follows:

“\$362.68.      “MONTICELLO, IOWA, Oct. 17, 1890.

“*G. W. & G. L. Lovell, Bankers:*

“Pay Osborn Brothers, or bearer, three hundred sixty-two, 68-100 dollars.

“JOHN JACOBS.”

The petition alleges that the payees of the check, in the usual course of business, transferred it to the plaintiffs by writing thereon “Osborn Brothers;” that it was forwarded through a bank in Dubuque to a bank in Monticello, which presented it to G. W. & G. L. Lovell for payment, but that payment was refused for the reason that the defendant had ordered that payment be not made; and that the check was then duly protested.

The answer alleges that the check was given to pay the purchase price of one hundred and twenty-five young hogs which were sold by Osborn Brothers to the defendant; that, to induce him to purchase the hogs,

Osborn Brothers fraudulently and falsely stated that said hogs were perfectly sound and free from all disease, and warranted them to be so, well knowing at the time that they were not sound and free from disease; that the defendant relied upon such statements and warranty in making the purchase, and believed such statements to be true; that the hogs were not as represented and warranted, but at that time were infected with a fatal disease, which caused the death of one hundred and eighteen of the hogs purchased, and rendered the remaining ones worthless, by reason of which there was a total failure of consideration for the check. Damages [to other hogs of the defendant, and for services rendered and medicines used in attempting to cure the hogs, to the amount of three hundred and fifteen dollars, are also alleged. The answer denies that the plaintiffs are now the owners of the check, and avers that this action is brought for the benefit of Osborn Brothers, who are the sole parties in interest, for the purpose of avoiding the defense pleaded.

I. On the trial, the plaintiffs introduced in evidence the check, the indorsement thereon, and the certificate of protest, and rested. The defendant then offered testimony which showed that the check was given for hogs, as alleged in the answer. That while he was negotiating for them he told one of the Osborns that he would not have diseased hogs on his place for one thousand dollars, and that Osborn said: "They are just as sound as any hogs could be. We have had them for some time, and they eat well and do well." That he also said: "I warrant every pig to be as sound as any pig you ever had on your place." That the price was then agreed upon, and the hogs purchased were selected from a large number in the yard where they were kept. That the purchase was made Wednesday, and the hogs were received by him the next Satur-

1. BANK checks:  
indorsement  
in blank: ef-  
fect of: cus-  
tom.

day. That they began to die, and many of them were dead on the next Wednesday, and that, of the one hundred and twenty-five purchased of the Osborns, one hundred and eighteen died within three weeks from the time they were received. That twenty-three of his hogs not obtained from the Osborns also died, and that he incurred expense and performed labor in caring for the diseased hogs. The evidence on that branch of the case would have authorized the jury to find that there was a total failure of consideration for the check. No witnesses testified for the plaintiffs in regard to their ownership of it, but the defendant stated that he had a conversation with Mr. Schoonover in which the latter was asked why he did not return the check to the Osborns, and answered: "I did try to return it, but they wouldn't take it back," and "I don't know whether they are worth anything, but we are secured by their father." In regard to obtaining the check, Mr. Schoonover said: "Osborn came in after banking hours, threw down the check and asked, 'How is that?'" Schoonover looked at it, and said, "All right," and gave credit for it. When payment of the check was refused by the persons on whom it was drawn, the cashier of the Monticello bank, to which it had been sent for collection, informed Schoonover by telephone of the fact. In response the latter said: "Well, what have I got to do about it?" The Osborns transacted their banking business with the plaintiffs, but refused to take up the check until an attempt should be made to collect it by suit.

The defendant admits, in effect, that, if the plaintiffs are innocent purchasers of the check for value, they are entitled to recover its amount, but he insists that in law they are presumed to have taken it for collection only, with the right to return it when payment was refused. For the purpose of showing that such a presumption is authorized, he offered to prove by two

experienced bankers of Jones county that, by general custom of bankers in that county and elsewhere, a check drawn on one bank, when presented to another by one of its customers, was passed to his credit, but that the credit so given was treated as a receipt for the check, and not as a payment. The offered evidence was rejected. The appellant insists that it should have been received, and cites numerous authorities to show that, in the absence of a special agreement, when a bank receives from a depositor a check upon another bank for collection, if, without fault on the part of the bank receiving it, the collection is not made, that bank has the right to return the check, and cancel the credit for it which was given to the depositor. The custom which the defendant sought to prove would not have affected the right of the plaintiffs to stand upon their agreement with Osborn Brothers. That was shown by the check and the indorsement thereon set out in the petition. The check is in form a negotiable instrument. The transfer of such checks is governed in most respects by the rules applicable to negotiable promissory notes. Tied. Com. Paper, sec. 440; 2 Pars., Notes and Bills, 57 *et seq.* Notwithstanding the fact that the check in suit is payable to bearer, it was transferred by an indorsement in blank. By so indorsing it, the payees assumed the same liability they would have been under by such an indorsement, had the check been made payable to order. Tied. Com. Paper, secs. 257a, 270; *Bigelow v. Colton*, 13 Gray, 309; *Smith v. Rawson*, 61 Ga. 208; *Johnson v. Mitchell*, 50 Tex. 212; 1 Morse on Banks and Banking, sec. 391; Story, Prom. Notes, sec. 132. The effect of the blank indorsement of a negotiable instrument, including delivery, is to transfer the title to such instrument to the indorsee, and the presumption, in the absence of a showing to the contrary, is that it was for a valuable consideration. Tied. Com. Paper, sec. 256. The effect of the indorsement in question was to transfer to the

plaintiffs the title to the check, not merely to enable them to collect it, but for all purposes. That such was the intent of the parties is shown to some extent by the fact that credit was given to Osborn Brothers for the check. In the absence of evidence that the giving of credit was only for the purpose of keeping a record of the check, a matter of bookkeeping, we must presume that it was intended as a payment. The custom of banks, upon which the defendant relies, could not have controlled the agreement of the parties as shown by the indorsement, and evidence to prove it was, therefore, properly rejected. The claim that the plaintiffs are not the owners of the check is not supported by the evidence.

II. A witness for the defendant testified that the indorsement on the check was, in his opinion, in the handwriting of one of the plaintiffs. On cross-examination the witness stated that he was not much acquainted with the handwriting of Osborn Brothers, and would not attempt to identify it, and that he would not say the indorsement was not in the handwriting of one of the Osborns. There was no attempt to show that the indorsement was made without due authority, and the evidence on that point would have been entitled to but little weight, had it been competent and material. It was immaterial, however, for the reason that the party whose signature the indorsement purported to be did not deny it in writing under oath. For that reason it was the duty of the court to treat it as genuine and admitted. Code, sec. 2730; *Robinson v. Lair*, 31 Iowa, 10.

III. It is said the jury might have found from the evidence that the check was procured from the defendant by fraud on the part of Osborn Brothers, and that the burden was on the plaintiffs to show that they procured it for a valuable consideration, without notice of the fraud. But the record does not contain evidence which would

2. —: signature  
of indorser:  
genuineness:  
evidence.

3. SALES: fraud:  
evidence.

have authorized the jury to find that the fraud alleged had been proven. The evidence fails to show with what disease the hogs died. It does not show that they were infected when sold. It is shown that, about the time the sale was made, there were some dead hogs in the yard where those sold were kept, and that some of them died soon after they were removed from it. But it is not certain whether the dead hogs in the yard specified died before or after the purchase was made, and, if it be conceded that the hogs in controversy were diseased when sold, it is not shown that Osborn Brothers knew that fact at the time of the sale.

We conclude that the evidence was not sufficient to authorize a verdict for the defendant, and that the action of the court in directing a verdict for the plaintiff was right. The judgment is **AFFIRMED**.

**OPINION UPON REHEARING.**

**WEDNESDAY, OCTOBER 18, 1893.**

**BY THE COURT.**—In a petition for rehearing, the appellant urges several objections to the opinion heretofore filed in this case, one of which demands notice.

It is said that the statement of the opinion that, as the signature which appeared to be indorsed on the check was not denied in writing, under oath, by the party whose signature it purported to be, it was the duty of the court to treat it as genuine and admitted, is erroneous. The answer does not deny specifically the genuineness of the signature, but avers that the check was delivered to the plaintiffs for the sole purpose of collecting it. There is a denial of some of the matters alleged in the petition, although it is at least doubtful if the genuineness of the indorsement is made an issue. We find, however, on further examination of the record, that the district court, in a ruling on the admission of testimony, treated the signature as

denied. It is the well settled rule that the genuineness of such a signature may be placed in issue by a denial not made by the person whose signature it purports to be, and that in such cases the burden of proof as to that issue is upon the party making the denial. Therefore, evidence to show that the signature in question was not genuine was material. The error of the opinion, in assuming that it was not, does not affect the result in this court, however, for the reason that the evidence submitted was not sufficient to authorize a finding that the signature was not genuine.

Other questions discussed in the petition for rehearing were so treated in the opinion that we do not deem it necessary to notice them further. The petition for rehearing is OVERRULED.

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DEGRAFF, VRIELING & COMPANY, Appellants, v. P.  
WICKHAM *et al.*, Appellees.

1. **Contract: LIQUIDATED DAMAGES: EVIDENCE.** Where a contract for the erection of a house provided that if the builder "should fail to comply with the terms of this contract which relates to the time within which said work or parts thereof are to be completed," he should "forfeit ten dollars *per diem* for each and every day thereafter, until the completion of the work," which sum the owner was authorized to deduct from any moneys due the builder, and if such amount should not be due the latter, the builder agreed to pay the same, and there was no evidence as to the cost of said house, nor of its rental value, *held*, that the sum named must be construed as liquidated damages.
2. ———: **INTENTION: BURDEN OF PROOF.** In such case the burden of proof upon the question of the rental value of said premises is upon the party contending that said provision in the contract should be construed as a penalty.

*Appeal from Pottawattamie District Court.*—HON. H. E.  
DEEMER, Judge.

TUESDAY, MAY 24, 1892.

89	730
84	683
89	730
98	380
89	720
111	698
111	699
89	720
131	290
131	291
89	720
137	100
89	720
138	125

ACTION for judgment on an account and to foreclose a mechanic's lien. From a decree refusing the enforcement of the lien the plaintiffs appeal.—*Affirmed.*

*Burke & Hewitt*, for appellant.

*Shea & Galvin*, for appellees.

KINNE, J.—The plaintiff claims that by virtue of a parol contract, made December 14, 1888, with Wickham, through Lainson, it furnished materials for the former for the erection of a dwelling house; that in due time it made out and filed with the clerk of the district court of Pottawattamie county a proper statement of the account for a lien, duly verified, and showing a balance due of four hundred and ninety-five dollars and ten cents; that on March 1, 1889, it, in writing, notified Wickham of its claim; that Wickham knew when the contract of the plaintiff was made with Lainson, and that plaintiff was to furnish materials for said house; that, when said contract was made, and the delivery of materials begun thereunder, Wickham owed Lainson more than the balance now due the plaintiff; that Wickham paid large sums to parties who furnished material and labor for said house, and who never filed liens therefor. Ole Rasmussen and John Mysten are also made defendants. The plaintiff asks judgment, and that its lien be established and enforced, and held superior to any liens of the defendants. Rasmussen filed an answer and cross petition, claiming a lien for labor and material furnished by virtue of a verbal contract with Lainson for ninety-six dollars and fifty-one cents; avers that, within thirty days from the time of furnishing the last labor and materials he filed a proper statement of account and affidavit for a lien with the proper officer, and also served a written notice of his claims and of filing his lien upon Wickham. He also asks a foreclosure of his

lien, and a decree establishing it as prior to the plaintiff's. In an amendment he avers that the plaintiff had full knowledge that he was furnishing labor and material for said house. Wickham answered Rasmussen's cross petition, admitting, in substance, all the allegations therein, except the amount due. Jennie Wickham, in a separate answer, denies all the allegations of the plaintiff's petition. O. P. Wickham answered the plaintiff's petition, admitting ownership of the property and the making of a contract with Lainson for the erection of the house. He denied making any contract with the plaintiff, and averred that before he had any knowledge that the plaintiff was furnishing materials to Lainson he had paid Lainson, according to the terms of his contract with him, the full amount due him, except four hundred and sixty-five dollars and twelve cents, which he held and still holds subject to his claim of forfeiture under the terms of his contract with Lainson; that the plaintiff's claim was filed more than sixty days after the delivery of its material; and he had no notice of any claim made by the plaintiff against him until more than sixty days after its material was delivered; that his contract with Lainson provided that the house should be completed October 1, 1888, and also provided that Lainson should forfeit ten dollars per day after that time until said contract was completed and the house finished, and that the defendant should retain said sum out of any money in his hands; also averred that the contract and building were not completed until March 10, 1889, by reason whereof there was due the defendant one thousand, five hundred dollars. The defendant also claims that Rasmussen and Mysten filed liens which are superior to the plaintiff's. In an amendment Wickham avers that he paid no money to anyone after the plaintiff furnished and delivered its materials, except one hundred and fifty dollars to Rasmussen for work done on said

house, and it was paid on an order from Lainson prior to the time the plaintiff's material was delivered; that he did not know until fifty days after the materials were furnished for which the plaintiff claims pay who was furnishing the same, or where they were being procured, and that he paid nothing thereafter.

I. A material part of the contract entered into between defendant O. P. Wickham and the defendant Lainson reads as follows:

"And it is understood \* \* \* that if [Lainson] shall fail to comply with the terms of this contract which relates to the time within which said work or parts thereof are to be completed [Lainson] shall forfeit ten dollars *per diem* for each and every day thereafter, until the completion of the work by [Lainson,] subject, however, to discretion of [Wickham], which sum shall be deducted from any money which may be due him; and if that amount be not due, then [Lainson] agrees to pay the same."

The plaintiff's contention is that the provisions above quoted fix a penalty only, while the defendant Wickham insists that they should be construed as providing for liquidated damages. There is no fixed and invariable rule applicable to such contracts, and there is great conflict in the authorities relating thereto. In some particulars, however, the law seems to be fairly well settled. Whether the sum mentioned in the contract is to be "considered as a penalty or as liquidated damages is a question of construction, on which the court may be aided by circumstances extraneous to the writing. The subject-matter of the contract, the intention of the parties," and other facts and circumstances may be considered. *Foley v. McKeegan*, 4 Iowa, 1; *Beard v. Delaney*, 35 Iowa, 16; *Perkins v. Lyman*, 11 Mass. 76; *Brewster v. Edgerly*, 13 N. H. 275; *Wolf v. Des Moines & Ft. D. Railway Co.*, 64 Iowa, 380; *McIntire v. Cagley*, 37 Iowa, 676. And while the

words "forfeit," or "forfeiture," "paid sum," or "penalty," used by parties in contracts, have sometimes been treated as furnishing a strong, if not conclusive, indication of the intent of the parties, yet it is well settled that the weight to be given to such words will depend on their connection with other parts of the instrument, the nature of the agreement, the intention of the parties, and other facts and circumstances. *Foley v. McKeegan*, 4 Iowa, 1; *McIntire v. Cagley*, 37 Iowa, 676; *Wolf v. Des Moines & Ft. D. Railway Co.*, 64 Iowa, 380; *Chamberlain v. Bagley*, 41 N. H. 234. So, if the damages are uncertain, and incapable of definite ascertainment, the damages fixed in the contract will not be considered in the nature of a penalty, but may be recovered. Usually, however, where, from the very nature of the provisions of the contract of the parties, it appears that the actual damages may be ascertained, and that they will be of trifling importance as compared with the sum fixed as stipulated damages, such provisions will be treated as providing for a penalty. *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Pierce v. Jung*, 10 Wis. 30; *Lyman v. Babcock*, 40 Wis. 521; *Dullaghan v. Fitch*, 42 Wis. 679. Again, in determining the construction to be given such contracts, we must take into consideration facts as to whether the contract contains more than one condition, and, if so, whether the provision relied upon applies to one or all of them. *Foley v. McKeegan*, *supra*, and cases therein cited.

It will be seen that, guided by the rules above stated, each case must be determined upon its own peculiar facts. In the light of the authorities and of the facts in this case, we think the court below properly held the provisions in the contract under consideration were intended by the parties to be considered and treated as providing for liquidated damages. The damages which might ensue from the breach of the contract

were, in their nature, to some extent, at least, uncertain, and, for all that is disclosed by the evidence, they may have been difficult of ascertainment. The provisions of the contract applied only to the time within which the work on the house should be completed. While it may be true, as the appellant contends, that the damages as fixed would be "manifestly above the injury sustained," yet, in view of the condition of this record, we are unable to see how we would be justified in so holding, in the absence of any testimony as to what was the reasonable rental value of the house. Surely we would not be justified, for the purpose of holding this provision in the contract a penalty, in arbitrarily, in the absence of testimony, determining the rental value of the property. Nor does the evidence even show the entire cost of the house. Again, it will be noticed that the contract not only fixes the sum per day which shall be the damages to be assessed for the breach of the contract, but it goes further, and authorizes Wickham to deduct the same from any money of Lainson in his hands; and then provides, if the amount due Lainson and in Wickham's hands is not sufficient, that Lainson agrees to pay the balance. These provisions clearly indicate that the parties intended thereby to provide for liquidated damages. We think the fact of this arrangement for payment is material in the construction of this contract, as showing the intent of the parties.

II. This case seems to have been tried in the court below on the theory that the provision in the contract which we have referred to was one for liquidated damages. As we have said, no evidence was introduced as to the rental value of the property. It seems to us that it was no part of Wickham's case to introduce such evidence. He was insisting that the contract provided for liquidated damages, and, if the

2. —: —: in-  
tention: bur-  
den of proof.

plaintiff intended to rely on the other theory, it should have shown what the rental value of the property was. In the absence of such evidence, the court, under all the facts and circumstances, was justified in presuming that the amount retained by Wickham was at least not greatly in excess of the rental value of the house. If we are right in our view that it was incumbent on the plaintiff to show the rental value of the property, and it has not done so, it follows that the case should not be reversed, because such fact, if shown, might tend to justify a finding that the contract provided for a penalty only. We could not reverse the case, and permit the plaintiff to put in testimony which it should have introduced on the trial.

III. It is insisted that Wickham is estopped. We have examined this question, and are unable to find that Wickham did anything which should be held to estop him from claiming damages. The plaintiff furnished the materials for which it seeks to recover after the contractor was in default. In fact, it was about three months after the building was to be completed before the plaintiff furnished its material. The plaintiff must be held to know the terms and conditions of the contract between Wickham and Lainson.

In the view we have taken of this case, we need not consider other questions raised. The judgment of the district court is **AFFIRMED**.

#### OPINION UPON REHEARING.

THURSDAY, JANUARY 18, 1894.

GIVEN, J.—On the former submission the judgment of the district court was affirmed. The questions involved being important, and such as may frequently arise, a rehearing was granted, and we have carefully reviewed the case in the light of all the arguments and authorities cited.

The first contention is whether the ten dollars *per diem* mentioned in the contract is to be considered as a penalty or as liquidated damages. It is not questioned but that the intention of the parties is to control, and that in arriving at their intention the subject-matter of the contract, and the facts and circumstances attending its execution, may be considered. The appellant contends that the opinion erroneously holds the burden of showing these facts and circumstances to be upon the plaintiff. *Tayloe v. Sandiford*, 7 Wheat. 13, is cited, and largely relied upon. In that case, as in this, the question was whether the sum mentioned in the agreement was penalty or stipulated damages. The language of that agreement was: "The said house to be completely finished on or before the twenty-fourth day of December next, under the penalty of one thousand dollars in case of failure." The court says: "In general, a sum of money in gross to be paid for the nonperformance of an agreement is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties. Much stronger is the inference in favor of its being a penalty when it is expressly reserved as one. The parties themselves denominate it a penalty, and it would require very strong evidence to authorize the court to say that their own words do not express their own intentions." The contract in this case does not name a sum in gross, but a *per diem* to be paid for each day that the defendant Wickham might be deprived of the use of his house by reason of its not being completed at the time agreed. The parties had a right to fix this *per diem* upon the basis of the value of the use the

house to the defendant, even at a high rate, and they had a right to name a sum that would be an incentive to Lainson to complete the house by the time agreed upon. In *Tayloe's case* the agreement, taken alone, showed the one thousand dollars to be penalty. This agreement, taken alone, shows the ten dollars per day to be liquidated damages, and, under the rule in *Tayloe's case*, it was incumbent on the party claiming it to be penalty to show that it was so considered by the contracting parties.

Our re-examination of the facts confirms us in the correctness of the conclusion announced on the question of estoppel. The former opinion seems to us to be correct, and it is, therefore, adhered to, and the judgment **AFFIRMED**.

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**HEAD BROTHERS, Appellees, v. SARAH A. NEWCOMB *et al.*, Appellants.**

**Judgment: SATISFACTION: RECORD: ESTOPPEL.** Where a judgment was permitted to appear satisfied of record, by a sale of real estate under execution, for nearly a year, when the sale and satisfaction were set aside, on the ground that the property sold was the homestead of the judgment debtor, and the judgment reinstated by order of court, *held*, that a mortgage, which was junior to said judgment, and purchased after maturity, but before the satisfaction of said judgment was set aside, and without notice of said homestead rights of the judgment debtor, was entitled to priority over said judgment.

**UPON REHEARING.**

**Judgment: SATISFACTION: RECORD: MISTAKE: PRIORITY OF LIENS.** The priority of the lien of the mortgage in such case would not be affected by the fact that, prior to the purchase of the mortgage, an order of court had been entered setting aside the levy and sale under said judgment, if proceedings to reinstate said judgment were not commenced until after said purchase.

*Appeal from Greene District Court.*—HON. J. H. MACOMBER, JUDGE.

**SATURDAY, OCTOBER 8, 1892.**

ACTION in equity in two counts for the foreclosure of two separate mortgages on real estate, executed by Sarah A. Newcomb by her then name of Sarah A. Foley, to secure her certain promissory notes. No defense is made against the first mortgage, therefore it will not be further noticed. The defendants Caughlin and Boyd, judgment creditors of Sarah A. Newcomb, defend, and allege that said second mortgage, and note secured thereby, were given without consideration, and with intent to defraud these defendants as such creditors. The plaintiffs in reply admitted that judgments were rendered against Sarah A. Newcomb in favor of the defendants and alleged that they were paid and fully satisfied of record on the first day of June, 1889; that they were reinstated May 1, 1890, without notice to the plaintiffs. They deny that said note and mortgage are without consideration, or that they were given with intent to defraud the defendants. The decree was entered in favor of the plaintiffs upon both mortgages. The defendants Caughlin and Boyd appeal.—*Affirmed.*

*J. A. Gallaher*, for appellants.

*Head & Smith*, for appellees.

GIVEN, J.—The appellants contend that, as the note and mortgage in question were assigned to the appellees after due, they hold the same subject to any defense which might be made, if suit were brought by the indorser, and that as said note and mortgage were given without consideration, and to defraud the appellants as judgment creditors of Sarah A. Newcomb, the appellees are not entitled to recover thereon. The appellees concede the general rule to be as stated, but contend that under the facts the appellants are estopped, by reason of their laches, from maintaining said defense

as against the appellees. The facts as shown by the evidence are these: The appellants each obtained judgment in the district court against John Foley as principal and Elizabeth A. Foley as surety, November 27, 1886. On June 1, 1889, execution upon each judgment was returned "satisfied in full by the sale of land levied upon." The court records thus stood until the following entry was made:

Appearance No. 2,043, Sarah A. Newcomb against J. H. Black, sheriff, Alexander Boyd and Edward Caughlin. Defendants appeared by J. A. Gallaher, their attorney. Plaintiff appeared by J. D. Howard, her attorney. And now, to wit, on this first day of May, A. D. 1890, this case comes on to be heard on the motion of Boyd and Caughlin to correct the decree herein, and reinstate their judgment against the plaintiff, and the court, being fully advised, finds that the original judgment against plaintiff, and in favor of said defendants Boyd and Caughlin, was satisfied and cancelled by the application of the proceeds of land that this plaintiff owned, and by authority of executions issued therefor. That afterwards, that is to say, after February, 1890, term of this court in this action, said levy and sale were set aside and held to be naught by the court, as said land so sold was held to be the homestead of this plaintiff and exempt from execution. Therefore said motion is sustained, and this order adjudged and decreed by the court that the said original judgments be, and they are hereby, reinstated, and the clerk of this court is directed to enter upon judgment docket against said judgments the fact that they are now reinstated, and are now in full force and effect, as though said sale and payments had never been made."

It does not appear when this motion was filed, nor when, "after February, 1890, term," said levy and sale were set aside. According to the time fixed for the terms of that court in 1890, of which we take judicial

notice, the next regular term after February commenced April 28; hence we conclude that the levy and sale were set aside on or after that date, and before May 1. The note and mortgage in question were assigned to the appellees on March 11, and the assignment filed for record on March 17, 1890. It will be observed that at the date on which the appellees purchased the note and mortgage the appellant's judgments appeared to be fully satisfied. There is no evidence that the appellees had any other notice concerning these judgments than that imparted by the record. It will also be observed that the appellants permitted their judgments to thus appear to be satisfied for nearly one year, and that their motion to reinstate them was not until some time after the appellee's assignment was filed for record; and that, notwithstanding the record of the assignment to the appellees, no notice was given to them of the application to reinstate the judgments. There is no question but that the appellees purchased the note and mortgage in good faith, for value, and without any information that would cause them to doubt the correctness of the record showing appellant's judgments to be satisfied.

It is argued that, as the land sold under the execution was the homestead of the execution defendant, and not subject to levy and sale, the sale was no satisfaction of the judgments, and that they stood reinstated by operation of law. Let this be conceded, yet it does not appear that the appellees knew that the land sold was the homestead. We infer from the record entry copied above that it was questioned whether or not it was the homestead of Sarah A. Newcomb, and there is nothing shown that would have put the appellants upon inquiry, or have required them to decide that controverted question. We are in no doubt but that the appellees purchased and paid full value for the note and mortgage in the belief that there were no prior judgment liens upon the mortgaged

property, and that, if the appellants had proceeded with reasonable promptness to have the satisfaction of their judgments appearing of record set aside, and the judgments reinstated, the appellees would not have so purchased the note and mortgage. "A court of equity will never interfere in opposition to conscience or good faith. \* \* \* It will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. \* \* \* A court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the neglect has subsisted is sufficient to make it effectual is a question to be observed by the sound discretion of the court." *Withrow v. Walker*, 81 Iowa, 651, and cases there cited. It is a familiar and invariable principle of equity that, where one of two innocent persons must suffer, he who is the cause of the loss must bear it. Concede to these judgment creditors the right to make any defense against this note which the maker might interpose, yet, like the maker, the right to defend may be barred by laches. Applying the principles of equity mentioned above, it seems to us entirely clear that these appellants have no right in equity to question the appellees' right to recover on this note and mortgage. It would be inequitable and unjust to hold that the appellees, who were led to purchase the note in good faith, and for full value, by reason of appellants' neglect to have their judgments reinstated, may be defeated by the defense set up by the appellants.

This view of the case renders it unnecessary that we inquire whether the note and mortgage are without consideration, and fraudulent, as alleged. The decree of the district court is **AFFIRMED**.

## OPINION UPON REHEARING.

FRIDAY, JANUARY 19, 1894.

GRANGER, C. J.—The appellants, in their petition for a rehearing, present the question of the correctness of the opinion in holding them guilty of laches in their proceeding to reinstate the judgments that were satisfied on the first of June, 1889. It is said in the petition that there is a mistake as to dates that may have led the court to a mistaken conclusion. It will be seen, by reference to the opinion, that the court was in doubt as to the precise date of the order setting aside the sale that led to the entry of satisfaction of the judgments, it being there stated: "It does not appear when the motion was filed, nor when, after February, 1890, term, said sale and levy were set aside, and the time in the opinion is fixed as about April 28. The appellants now call attention to the fact that the abstract is incorrect and that the words, "after February, 1890, term," should read "at the February, 1890, term," and it is said that the exact time was February 25. It is also urged that the pleadings do not properly present the question of an estoppel.

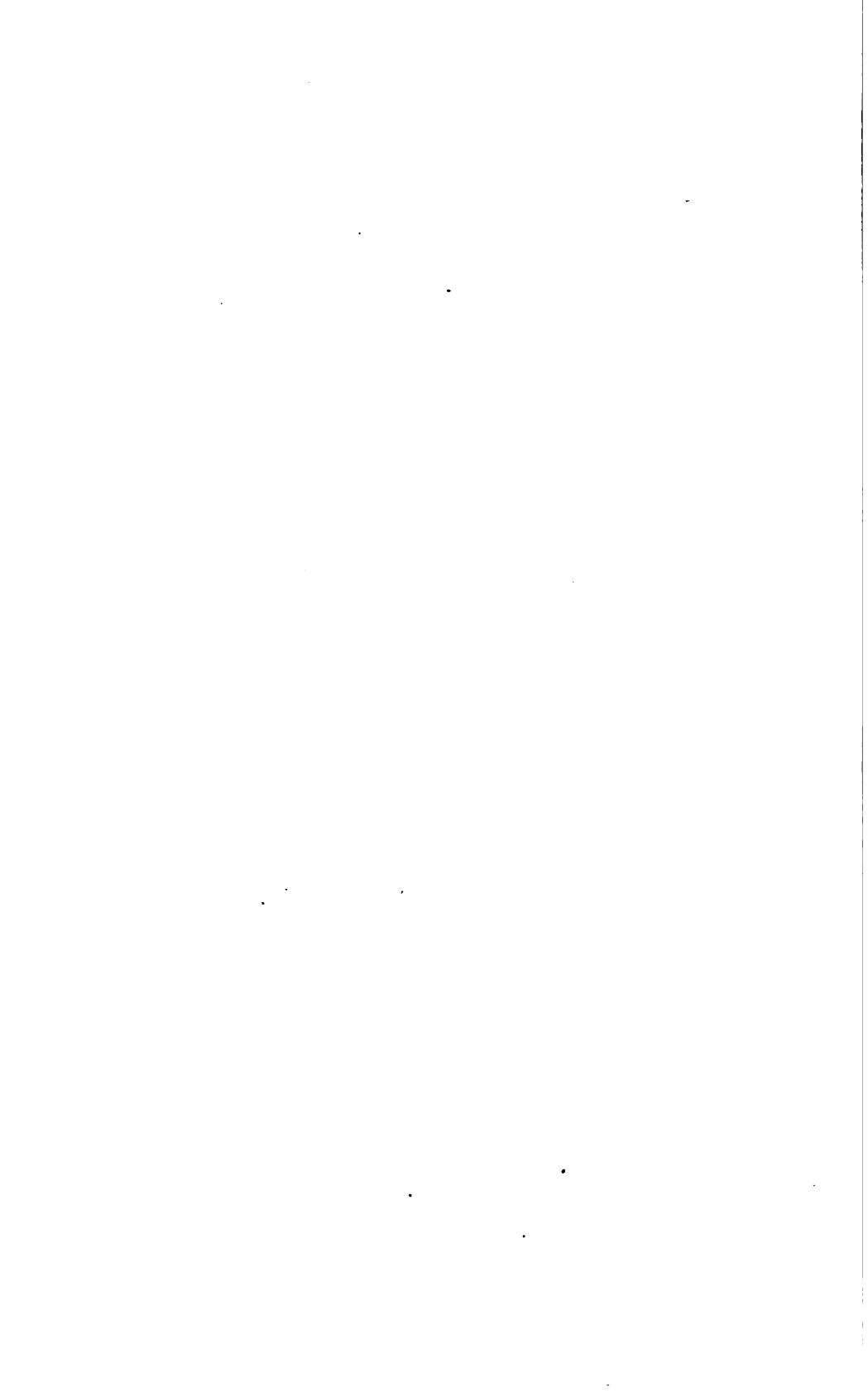
We were, of course, justified in considering the case with the facts as they appeared in the record. However, taking the record as claimed, and disregarding the theory of laches, we do not see how a different result is to be arrived at. Our reasoning will be more intelligible if we briefly summarize the facts in connection with it.

The defendants' judgments were obtained in November, 1886. Executions were taken thereon, and the homestead of the judgment debtor, being land other than that covered by the mortgage, was sold June 1, 1889, and the judgments satisfied of record.

In November thereafter, the judgment debtor, Mrs. Newcomb, instituted proceedings to have the levy and sale set aside, and on the twenty-fifth of February, 1890, an order was entered setting aside the levy and sale. At the April term, 1890, of the court, a motion was filed to reinstate the judgments, which was granted. On the eleventh of March, 1890, between the times of setting aside the levy and sale of the homestead and the reinstatement of the judgments, the plaintiff firm purchased the mortgage in question, and afterwards instituted this proceeding to foreclose the same, making the appellants Boyd & Caughlin parties defendant. These facts present the condition of the liens as they appeared when the plaintiff obtained the mortgage, and, we think, independent of the question of laches, it had a right, in good faith, to rely on the facts as they appeared of record. It will be remembered that the appellants were the parties that brought about the condition of the record on which the plaintiff relied. While it was the duty of the plaintiff, in making its purchase, to take notice of the public records, as they indicated the condition of the lands covered by the mortgage, it was not required to take notice of the record condition of other real estate, not, presumably, affecting such lands, in the absence of notice to that effect. At the time the mortgage was purchased, there were no judgment liens. The only rights the appellants had were those in action to create or reinstate judgments. The plaintiff was not required to take notice of, nor to anticipate, such a right or such proceedings. It seems to us to be an undoubted legal proposition that, as to third persons without notice, the entry of the satisfaction of the judgments was a suspension of the liens. In other words, as to such parties, there were no liens. Had the plaintiffs, during that period, taken a new mortgage to secure an investment, relying upon the records, its right to protection

would not be questioned. The difference, and the only one, is that it made the investment in a former security that, from the record, it had a right to believe was a first lien.

It is urged that the appellants were not in fault for the satisfaction of the judgments, because they honestly believed the sale of the other land was valid. In a very important sense, they were not in fault; that is, they made only an honest mistake. But such mistakes often lead to legal liabilities or losses. The same may be said of the plaintiff, in making the investment. It was not in fault. The appellant's mistake entails upon one of the parties a loss. Under the familiar rule stated in the opinion, it should be the party causing it, where both are innocent. As to other points discussed, we are content with the reasoning of the former opinion, and the conclusion therein announced is adhered to. **AFFIRMED.**



## APPENDIX.

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ABBY SCRIBNER, Appellee, v. J. H. YORK, Appellee, and BENTLY WORTH,  
Appellant.

**Foreclosure of Mortgage: DECREE.**

*Appeal from Polk District Court.*—HON. CHARLES A. BISHOP, Judge.

FRIDAY, MAY 12, 1893.

THIS is an action in equity to foreclose a mortgage on real estate given by the defendant York to the plaintiff. The defendant Bently Worth and others were made defendants, as having some interest. The defendant Worth alone appeared and answered. A decree was entered in favor of the plaintiff, from which the defendant Worth appeals.—*Affirmed.*

*H. E. Long*, for appellant.

*St. John & Stevenson*, for appellee.

GIVEN, J.—The appellant, Bently Worth, sets up as his defense the decrees as originally entered in the three cases of *Bently Worth v. Ira P. Wetmore et al.* The record shows that subsequently these decrees were amended by the district court by providing that they should not prejudice the rights of this plaintiff under her prior mortgage. The action of the district court was affirmed on the appeal of said cases to this court. See 87 Iowa 62. As thus amended and affirmed, the appellant's defense must fail, and the decree of the district court is, therefore, **AFFIRMED.**

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THE STATE OF IOWA, Appellee, v. DUNCAN BLACK, Appellant.

**Bastardy: EVIDENCE: INSTRUCTIONS TO JURY.**

*Appeal from Webster District Court.*—HON. D. R. HINDMAN, Judge.

MONDAY, MAY 16, 1893.

PROCEEDING under the statute to charge the defendant with the maintenance of a bastard child. There was a verdict and judgment for the state, and the defendant appeals.—*Affirmed.*

*Botsford, Healy & Healy*, for appellant.

*W. S. Kenyon*, County Attorney, and *M. D. O'Connell*, for the State.

KINNE, J.—I. This is a proceeding instituted in the name of the state at the instance of Alice Roy, who charges that the defendant is the father of her bastard child, born May 12, 1889. Alice Roy, it appears, had been acquainted with the defendant about eight years prior to the time the connection took place which she alleges resulted in the conception of her child. Her more intimate acquaintance with the defendant began in 1888. She testifies to various acts of intercourse between her and the defendant in July, August, and October, 1888, and claims the child was the fruit of the intercourse had with him in August, 1888. Error is assigned in the admission of testimony of Alice Roy, Fred Hazelbrink, and William Quad as to acts of intercourse had between Alice Roy and the defendant in October, 1888. In case of the last two witnesses the evidence was objected to as being incompetent, immaterial, and irrelevant, and in one case a motion was made to strike out the testimony so given. The objection and motion were overruled, to which timely exceptions were taken. It is urged that such evidence was not admissible, as connection had in October (two months after the alleged conception of the child) did not tend to establish the paternity of the child born May 12, 1889. Whether, in such a case, it is competent to show intercourse between the complainant and the defendant at a period so remote from the time the child must have been conceived, in the absence of evidence showing that the usual and ordinary period of gestation had not elapsed, we need not determine. The complainant testified without objection that she had intercourse with the defendant in October, 1888. It was not denied except by the plea of not guilty. The defendant did not go upon the stand. It follows, then, if the admission of other testimony to the same effect was error, it was without prejudice.

II. Exception is taken to the sixth instruction given by the court, and it is claimed that under it the defendant was required to establish his plea of not guilty by a preponderance of the evidence. The instruction reads:

"Evidence has been introduced on the part of the defendant tending to show that at, or about, the time the complaining witness, Alice Roy, became pregnant, she had sexual intercourse with other men, and if you shall find from the evidence in this case that at, or about, the time the said Alice Roy became pregnant she had sexual intercourse with any other man or men, such fact should be duly considered by you, and given such weight as, in your judgment, it is entitled to; and if such evidence, when considered with all the other evidence introduced on this trial, fails to satisfy your minds that the defendant is the father of the child born unto the said Alice Roy, then your verdict shall be for the defendant."

The instruction should be read in connection with the one which follows it, wherein the jury are plainly told that, even if they find that the

complainant did have connection with other men at or near the time the child was begotten, yet if they are fully satisfied from all the evidence that she became pregnant with and gave birth to a bastard child, that the mother and child are residents of that county, and that the defendant was the father of the child, they would be justified in finding him guilty. While the latter part of the instruction under consideration is objectionable as to its phraseology, yet, when read in connection with the other paragraphs of the charge, it is not open to the objection urged. The jury could not fail to understand from the whole charge that the burden was on the state to establish the fact that the defendant was the father of Alice Roy's child.

III. It is said the court erred in sending the complaint to the jury. We do not find that any objection was made to the court's action in this respect. The first time the matter appears in the record is in the motion for a new trial. Even if it was error, a point we do not decide, defendant could not take advantage of it, having, so far as the record shows, permitted the complaint to be sent to the jury without any objection on his part.

IV. It appears that for some reason, which is not disclosed in the record, the court read the seventh paragraph of the charge twice to the jury. It is claimed this prejudiced the defendant. No exception was taken at the time to this act of the court, and it is brought to our attention by affidavit of counsel. Whether the second reading was error would depend on the manner of the reading, and the reason for it. The record is silent as to these matters. Moreover, the matter presented should have been preserved by bill of exceptions. The record can not be thus enlarged by affidavits. *Blanchard v. Devoe*, 80 Iowa, 521; *McArthur v. Schultz*, 78 Iowa, 364.

V. Counsel insist that the evidence did not justify the verdict, and, as usual in such cases, the evidence is conflicting. There is evidence showing intercourse between complainant and other parties about the time the child must have been conceived. It is denied by the complainant, as also by some of the persons who are said to have been parties to the acts. Two or three young men, one of them a brother of the defendant, testified to having had intercourse with the complainant about the time conception would ordinarily have taken place. It is evident the jury did not believe these witnesses. They had the witnesses before them. They could observe their manner and conduct upon the stand. It may have been such as to satisfy the court and jury of the falsity of their statements. If the jury did not believe them, and did believe the testimony of the state's witnesses, there was ample evidence upon which to base their verdict. The defendant did not go upon the stand and deny the charge. We can not disturb the verdict. We have noticed all the errors argued by counsel.

The judgment must be **AFFIRMED**.

**A. HERSHEY, Appellant, v. THE BOTNA VALLEY STATE BANK, Appellee.**

**Original Notice; SERVICE ON ABSENT DEFENDANT: ESTOPPEL: HOME-STEAD.**

*Appeal from Mills District Court.*—HON. N. W. MACEY, Judge.

WEDNESDAY, MAY 17, 1893.

**ACTION** to establish a priority of liens. Judgment for the defendant, and the plaintiff appealed.—*Affirmed.*

*Smith McPherson, L. T. Genung and W. S. Lewis, for appellant.*

*E. B. Woodruff and P. P. Kelley, for appellee.*

GRANGER, J.—The record in this case presents precisely the same question for determination, and upon the same facts, as was determined in *Botna Val. State Bank v. Silver City Bank*, decided at the last term, and is reported in 87 Iowa, 479. Following the conclusion in that case, the judgment in this is *AFFIRMED*.

**PATRICK GREER, Appellee, v. WILLIAM POWELL et al, Appellants.**

**Boundaries: ACTION TO DETERMINE: EVIDENCE: STATUTE OF LIMITATIONS.**

*Appeal from Johnson District Court.*—HON. S. H. FAIRALL, Judge.

FRIDAY, OCTOBER 13, 1893.

THE parties plaintiff and defendant are owners of adjoining lots in Iowa City, upon both of which buildings were erected many years ago. The buildings occupy the whole of the lots. The plaintiff claims that the defendants' building occupies part of the plaintiff's lot, and this is an action in equity to settle and determine the dividing line between the lots, and to adjudicate the claims of the parties for the occupancy and use of part of the lots. There was a trial on the merits, and a decree for the plaintiff. The defendants appeal:—*Affirmed.*

*Robinson & Patterson, for appellants.*

*Slater & Conklin, for appellee.*

ROTHROCK, J.—There was a large mass of evidence introduced on the hearing, consisting of measurements and maps and plats of the prem-

ises, and the testimony of witnesses as to the time when the buildings of the respective parties were erected. It is impossible to set out the evidence thus introduced so that it would be understood by anyone not familiar with the location of the lots and buildings. Indeed, no one can understand the evidence and apply it to the matters in dispute so well as one who has personal knowledge of the property and its surroundings. It appears that there is a crack or seam between the buildings of the parties, and on the front thereof. The district court adopted this crack as the true line, and adjusted the respective claims of the parties on that line as the basis. Each one of the parties occupied over the line thus fixed with parts of his building, and the court, after examining the evidence as to the value of the parts thus occupied, and the value of the use, struck a balance, and judgment for the plaintiff for one hundred and four dollars and twenty-two cents, and apportioned the costs of the trial between the parties. Our conclusion is that the line fixed by the district court ought to be held to be the true line.

It is claimed that the action is barred by the statute of limitations. We do not think that the possession by the defendants and their grantors was adverse, and, in our opinion, the allowance made for use and occupation for five years prior to the commencement of the action was correct.

The decree of the district court is **AFFIRMED**.

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**PRAY, DRYER & COMPANY, Appellee, v. FARMERS' INCORPORATED CO-OPERATIVE CREAMERY, Appellant.**

**Sales: AUTHORITY OF AGENT: DECLARATIONS: INSTRUCTIONS: EVIDENCE.**

*Appeal from Butler District Court.*—HON. G. W. RUDDICK, Judge.

FRIDAY, OCTOBER 13, 1893.

**ACTION** at law to recover damages for the defendant's failure to ship to the plaintiff four thousand, seven hundred and seventy-two and one half pounds of butter as per an alleged agreement. The defendant answered, denying generally. From a verdict and judgment for the plaintiff, the defendant appeals.—*Affirmed*.

*J. H. Scales*, for appellant.

*McIntyre, Hemenway & Grundy*, for appellee.

**GIVEN, J.**—The evidence shows without conflict that the plaintiff had, previous to the transaction in question, purchased butter from the defendant through its manager, Mr. A. B. Watson. That on September 3, 1891, Mr. Watson telephoned the plaintiff, asking if they wanted a

shipment of butter, to which they answered in effect that if they did they would wire up and buy it before Friday the next week. On September 3, Mr. Dryer, of the plaintiff firm, went to the defendant's creamery, and found Mr. James Santee, who was employed as a butter maker, in charge. Mr. Santee had the butter in question loaded to be taken to the railroad station for shipment. Santee and Dryer then and there agreed upon a sale of the butter to the plaintiff, and the price to be paid, whereupon the butter was unloaded, weighed, the marks removed, and the butter placed in the defendant's storage room. On September 4, the plaintiffs deposited in the post office at Shell Rock, Iowa, addressed to the defendant at Cluterville, Iowa, a draft for the agreed price of the butter. This draft should have been received by the defendant in the ordinary course of the mail on or before the following Saturday, but it was missent, so that the defendant did not receive it until the following Thursday, September 10. On September 10, the defendant shipped the butter to New York. The plaintiff claims that Mr. Santee agreed to receive the draft when deposited in the post office at Shell Rock as payment for the butter, and that defendant was to haul the butter to the railroad station, and ship it to the plaintiff, within a reasonable time, or when the defendant should need the storage room, or when the plaintiff should order the shipment. The defendant contends that the draft was to be sent so that the money could be realized thereon by Saturday following the sale, and that, not being so received, the plaintiff was not entitled to the butter. The defendant also contends that the plaintiff failed to show that Santee had authority to sell the butter, and especially upon the terms claimed by the plaintiff. The controlling questions are whether Mr. Santee did agree to receive the draft as payment when deposited in the mail at Shell Rock, and whether he had authority to so agree.

I. The court instructed that the burden was on the plaintiff to prove by a preponderance of the evidence that Mr. Santee had authority from the defendant to make the sale of the butter, and, if they failed to so find, their verdict should be for the defendant. The appellant cites the rule that power to sell only confers authority to sell in the usual way, and complains of the refusal to give instructions asked to the effect that authority to Santee to sell the butter did not authorize him to agree to take in payment a draft deposited in the post office at Shell Rock. The instruction given must be read in the light of the issue and facts to which it related. The issue was as to Santee's authority to make the particular contract as claimed by the plaintiff, and the question of his authority to receive in payment a draft deposited in the post office at Shell Rock was included in the questions submitted in the instructions given.

II. On the trial the plaintiff Dryer testified that the plaintiff Pray asked Mr. Santee why he did not ship the butter, and he said on account of the delay of the draft. The appellant moved to strike out this evidence as incompetent, immaterial, and the conclusion of an unauthorized person. The motion was overruled, and the appellant assigns the ruling as error, claiming that it is contrary to the rule "that the agent's declarations, made after the transaction is fully completed and ended, are not admis-

sible." The rule as claimed does not apply to this case. The transaction was not fully completed, and the evidence sought to be stricken out was the answer of the agent, who, according to the appellee's claim, had authority to and did make the sale and agreement to ship. It was in response to the appellee's inquiry why the shipment had not been made, and was a part of the incompleting transaction.

III. The appellant's further contentions are that the evidence fails to show an agreement to accept the draft deposited in the post office at Shell Rock, Iowa, in payment of the butter; that it fails to show that Mr. Santee had authority to make sales of butter for the appellant, and fails to show that he had authority to agree to take a draft deposited in the post office at Shell Rock, Iowa, in payment for butter. As already stated, there is no question but that Mr. Santee did make an agreement with the plaintiff for the sale of the butter, but there is a question as to his authority to make the agreement claimed, and whether he did make it as claimed with respect to receiving the draft. There is evidence tending to show that Mr. Santee had authority to and did agree as claimed by the plaintiff, and evidence to the contrary. This conflict was fairly submitted to the jury, and, their finding having support in the evidence, we cannot disturb their verdict.

Our conclusion is that the judgment of the district court should be **AFFIRMED**.

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C. C. PARKS, Appellee, v. I. N. WOODS, Appellant.

**Action on Promissory Note : PARTIAL PAYMENTS: EVIDENCE.**

*Appeal from Dallas District Court.*—HON. J. H. APPLEGATE, Judge.

FRIDAY, OCTOBER 13, 1893.

**ACTION** on a promissory note. There was a verdict and judgment for the plaintiff, from which the defendant appeals.—*Affirmed*.

*Shortley & Harpel*, for appellant.

*Cardell & Nichols*, for appellee.

KINNE, J.—I. The plaintiff's action is on a promissory note, dated January 1, 1874, for seventy-eight dollars and eighteen cents, drawing eight per cent. interest, and due four months after date. November 10, 1876, there was an indorsement of thirty-three dollars and fifty cents made on the note. The plaintiff pleaded and established facts which showed that within ten years prior to the commencement of this suit the defendant had, in writing, acknowledged his indebtedness upon said note, and agreed to pay the same. The defendant denied all the allegations in the petition, and pleaded the statute of limitations. In a further answer

he denied the execution of the note, and averred that on January 1, 1873, he executed and delivered to the plaintiff his promissory note, which was identical with the note declared upon in the petition, except the date thereof. Averred that after he executed and delivered said note to the plaintiff, said plaintiff maliciously altered the same, and changed the date thereof from 1873 to 1874, and also altered the date of the indorsement thereon from 1874 to 1875. He also pleads that the "note referred to herein as executed in 1873" should have credited thereon forty-one dollars of date of June, 1873, and thirty-six dollars and thirty-five cents as of date October 13, 1874. The cause was tried to a jury, and a verdict rendered for the plaintiff for one hundred and thirty dollars and fifty cents, the amount claimed by the plaintiff to be due. Judgment was entered upon the verdict, and the defendant appeals.

II. The only question presented by the record arises upon the giving of the fifth instruction by the court to the jury. In it the court said to the jury: "*Fifth.* If you find from the evidence in this case that the note in suit was executed by the defendant on the first day of January, 1874, and you further find that since the execution of said note, and within the ten years prior to the bringing of this suit, the defendant, in writing, acknowledged indebtedness due from him to the plaintiff, then and in that event your verdict should be for the full amount due upon said note, after allowing the credit indorsed on the back thereof." The jury were also instructed, if they found the note was executed January 1, 1873, and the plaintiff had not altered or changed its date, and the defendant, in writing, had within ten years just prior to the bringing of this action acknowledged himself indebted to the plaintiff upon said note, to find for the plaintiff for the amount due upon said note, less the credit indorsed thereon, together with such other sums as the testimony showed the defendant had paid thereon. The complaint is that the court erred in virtually instructing the jury that, if the note sued on was executed in 1874, they could not allow the defendant's claimed credit of forty-one dollars of date of June, 1873.

We think, under all the facts disclosed by this record, the instruction was warranted. The defendant denied in his answer and on the witness stand that he had given a note to the plaintiff in 1874. His testimony touching this matter was so positive as to leave no ground for a claim that he was in-doubt as to the date of the note he had given. The note in suit was so worn that it only showed in the date line the figures "187 ." The plaintiff introduced evidence showing the note bore date January 1, 1874. The defendant introduced evidence showing the note was dated in 1873, and denied giving the plaintiff a note in 1874. He also showed that in the summer of 1873, the plaintiff purchased from him a heifer and cow for forty-one dollars, which amount the plaintiff agreed to credit upon said note, and had failed so to do. From the evidence it appears that the parties had had dealings in 1874, and prior to that time, as far back as 1871, during which time the defendant had executed several notes to the plaintiff, had from time to time made payments thereon, and then gave new notes for the balance remaining due, including what he at the time owed the

plaintiff on book account. It appears also that settlements were had between them at the beginning of each year. Now, it is clear that if the note sued upon was executed, as the jury must have found, in 1874, the credit which the defendant claims he was entitled to as of date of June, 1873, must have been upon some note other than the one in suit. Now, the defendant in his answer does not claim a credit of forty-one dollars on a note executed in 1874. He says it was on a note executed in 1873. As the jury found this note was executed in 1874, and as the credit claimed was for property sold the plaintiff several months prior to the time the note in suit was in fact executed, it is clear that the credit was not to be made upon the note in suit, but on a prior note. There was no error in the giving of the instruction. **AFFIRMED.**

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GEORGE HAW & COMPANY, Appellants, v. AMERICAN WIRE NAIL COMPANY, Appellees.

**Contracts: STATUTE OF FRAUDS: PLEADING: EVIDENCE.**

*Appeal from Woodbury District Court.*—HON. SCOTT M. LADD, Judge.

SATURDAY, OCTOBER 14, 1893.

**ACTION** to recover for an alleged breach of a contract to deliver two thousand kegs of wire nails. The defendant denied that the plaintiff made any contract with the defendant for the purchase of nails. There was a trial by jury. At the close of the introduction of the evidence, the defendant presented a motion requesting the court to instruct the jury to return a verdict for the defendant. The motion was sustained, a verdict for the defendant was returned, and judgment was rendered against the plaintiffs for costs. The plaintiffs appeal.—*Affirmed.*

*Wright, Hubbard & Yeomans, for appellants.*

*Taylor, Shull & Farnsworth, for appellee.*

ROTHROCK, J.—I. The plaintiffs claimed that the contract under which they claimed the right to recover was in writing. The defendant denied this averment, and the question made by the pleadings was whether there was a written contract. It is conceded that no payment was made by the plaintiffs to the defendant, and no nails were delivered, and, under section 3664 of the Code, commonly known as the "Statute of Frauds," it was incumbent on the plaintiffs to show by written evidence that a contract was made, as claimed. The only question in the case is whether, upon a fair consideration of all the competent evidence, the direction to the jury to return a verdict for the defendant was erroneous. It is true that counsel for the appellant give some atten-

tion in their argument as to whether the contract as shown by the evidence ought not to be regarded as within the exception contained in section 3685 of the Code, by which parol evidence is admissible to establish a contract of purchase "when articles of personal property sold, are not at the time of the contract owned by the vendor and ready for delivery; but labor, skill or money are necessarily to be expended in producing or procuring the same." It is a sufficient answer to this line of argument to say that a contract within the exception was not in issue between the parties, and the evidence in the case was not directed to such a contract. The action, by the averments of the petition, was upon a written contract alone, without exception or qualification.

II. In sustaining the motion to direct a verdict, the court made its ruling in the following words: "In order to sustain the action for the plaintiff, it is necessary for him to prove that the contract was wholly in writing. Our statute provides that a contract in such case as this should be wholly in writing. Now it appears that the plaintiff gave an order to his agent at Pittsburg (McLean) to buy these nails, in writing, but there is no evidence, according to the court's understanding, no evidence in writing, no evidence of any kind, in fact, showing that any order was made by McLean in writing upon the defendant for these nails; and therefore I think the evidence does not show that the contract was in writing, and for that reason there is no evidence sustaining the action of plaintiff, and the jury ought to be instructed, for that reason, to return a verdict for the defendant, and that is the instruction of the court." There is a large mass of evidence, in the form of correspondence between the parties, in reference to the alleged contract. There is also evidence that the plaintiffs' agent, McLean, made an order for nails upon a partnership under the name of Clement, Biddle & Co., and that this firm made an order on the defendant for nails, and that the plaintiffs were to receive part of that order. There is further evidence that Clement, Biddle & Co. withdrew and canceled the order; so that it fairly appears that the defendant never had nor accepted any written order from the plaintiffs for nails. As we have said, there is a large mass of correspondence between the parties. We do not set out this evidence. It is unnecessary to do so. No case like this will ever present the same facts. We have carefully examined and considered the evidence, and are satisfied that, if the court had submitted the case to the jury, and a verdict had been found for the plaintiffs, it would have been the duty of the court to set the verdict aside, and that the direction to render a verdict for the defendant was correct.

The judgment of the district court is **AFFIRMED**.

W. E. WEBB, Appellee, v. B. F. BAILEY *et al.* Appellants.

**Partnership: CONTRACT: CONSTRUCTION.**

*Appeal from Taylor District Court.*—HON. H. M. TOWNER, Judge.

MONDAY, OCTOBER 16, 1893.

ACTION by a partner to recover a balance due him under the partnership contract. From a judgment for the plaintiff the defendants appeal.—*Affirmed.*

*Flick & Thomas*, for appellants.

*G. B. Haddock*, for appellee.

KINNE, J.—In August, 1886, the plaintiff and one Charles Cope since deceased, entered into a written agreement, by the terms of which Cope leased to the plaintiff two hundred and forty-six acres of land in Taylor county, Iowa, for a period of three years from and after March 1, 1887. This contract was afterwards extended to include the year 1891. As a part of said contract, Cope placed upon said farm certain stock, feed, and chattels of the agreed value of two thousand, seven hundred and fifty-two dollars. It was also agreed that Cope might thereafter purchase and deliver other stock to Webb on said farm. All of the stock was to be kept and cared for by Webb, and to be prepared for market. The contract then provides: "Upon sale of any of said stock, or the increase thereof, at any time, the said Cope shall receive the money thereon, and shall deduct therefrom all expenses and sums due him for the purchase money of said stock, or principal or interest paid by him for money used in purchasing such stock or purchasing feed for the same, as well as purchase money for feed, and the money remaining, if any, then shall be the money and property of said Cope and Webb; each to have an equal share of such remaining sum." Webb was also to feed and care for the stock, using grain and grass grown on the farm, or that might be purchased by Cope for that purpose. The contract contains other provisions not bearing upon the matter in controversy. In 1891 Cope died, and the appellants are the administrators of his estate. All matters arising under said contract have been settled except one, and to this alone we shall direct our attention.

It is contended by the administrators that, by the terms of the lease, in settlement Cope should be reimbursed for interest paid for money used in purchasing the stock inventoried in the contract; that is, that interest should be computed at ten per cent. upon the two thousand, seven hundred and fifty-two dollars, the agreed value of the stock and other chattels turned over to Webb when he entered upon the farm under the lease. The plaintiff contends that the farm and inventoried chattels were put in

by Cope as against his (plaintiff's) labor. The amount of interest in controversy is one thousand, four hundred and thirty-eight dollars and sixty-four cents. One-half of this—seven hundred and nineteen dollars and thirty-two cents—the appellants seek to charge to the account of the appellee. The appellants, as administrators of Cope, retain this seven hundred and nineteen dollars and thirty-two cents, which the appellee seeks to recover. The cause was tried to the court below without a jury, and a judgment rendered in favor of the plaintiff for the amount claimed, with interest, from which the administrators appeal.

I. The contention between the parties arises out of the construction of the written agreement in so far as it relates to interest. We think the claim "upon sale of any of the said stock" clearly refers to all the stock that might be on the farm at the time of such sale, both the inventoried stock and that which Cope might purchase during the existence of the lease, as well as the increase of all of it. The language of the agreement as to interest is not clear, but we think, upon considering all the provisions of the contract, that the intention was to reimburse Cope for the inventoried stock at its agreed value, and for feed as per said invoice, and for whatever Cope might thereafter expend, either as interest or principal, in the purchase of more stock and feed; that is, he was to be repaid the agreed value of the stock and feed he put in in the first instance, and also the value of any additional stock he might purchase, and cost of feed for the same, and interest on any money he might be compelled to borrow for the purchase of stock thereafter.

We do not think that the language used, construed in the light of all the provisions of the contract, can be held to sustain the appellants' contention that the contract provides for payment of interest on the agreed value of the stock invoiced when the contract was entered into. The words "purchase money of stock" and "purchase money for feed" evidently refer to stock and feed turned over when the contract was entered into; and the words, "or principal or interest paid by him for money used in purchasing such stock, or purchasing feed for the same," refer solely to stock and feed thereafter to be purchased. In no other way, as it seems to us, can all parts of the contract be given full effect. The words "purchase money" occur twice in the contract; once referring to stock then on hand, and again referring to the feed then on hand. Whenever the future purchasing of stock or feed is provided for, the word "purchasing" is used, and it is in this connection that the provision for interest is made. Again, the clause, "or purchasing feed for the same," clearly refers to a purchase of feed for stock which may be bought in the future, not to a purchase of feed for stock then in hand. The clause last referred to follows immediately after the provisions which authorize Cope to deduct "principal or interest paid by him for money used in purchasing such stock."

It is said that our construction of the contract shows it to be an unreasonable one. That it can not be presumed that Cope, by the language used, intended to put in the farm and the two thousand, seven hundred and fifty-two dollars worth of stock, feed, and other chattels as

against the labor of Webb. We can not change the contract entered into by the parties. We can not charge the plaintiff with interest, unless by virtue of the express agreement of the parties, as otherwise there is no debt which can be the basis of an interest charge. Nor can we, in such a case, take notice of what may be the usual custom as to charging interest under circumstances like those disclosed in this case. The only question is, what does the contract provide as to interest? When its meaning in that respect is ascertained, it must be carried out, regardless of its effect on the parties.

We conclude that the court below was right, and its judgment is **AFFIRMED.**

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DES MOINES AND FORT DODGE RAILWAY COMPANY, Appellee, v. E. G. BULLARD *et al.*, Appellants.

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**Action to Quiet Title: FORMER ADJUDICATION: ADVERSE POSSESSION.**

*Appeal from Humboldt District Court.*—HON. LOT THOMAS, Judge.

TUESDAY, OCTOBER 17, 1893.

THIS is an action in equity to quiet the alleged title of the plaintiff to certain lands in Humboldt county. There was a full hearing on the merits and a decree for the plaintiff. The defendants appeal.—*Affirmed.*

*E. F. Bullard*, for appellants.

*John F. Duncombe*, for appellee.

ROTHROCK, J.—I. This case may be said to be a supplement to the case of *Bullard v. Des Moines & Ft. Dodge Railway Co.*, 62 Iowa, 382. It involves the title to the same land. It was held in that case that the title was in the railroad company. The plaintiff in that case is the counsel for the defendants in this appeal, and two of the appellants are sons, and the other is his wife. It was not claimed in the cited case that the wife and sons had then any interest in the land. That was a trial of the title of the land, and we will dispose of much that is found in the record in this case by the single remark that the adjudication in the former action disposed of all claim of title which E. F. Bullard had in the land. He was the plaintiff in the action, and neither he, nor those claiming under him, had any right to commence an action upon one claim of title, and pursue it to the end of final adjudication, as that case was pursued, and then set up other causes of action in another suit, or by way of defense to an action brought by the defendant in the former action; in other words, it was incumbent on E. F. Bullard to assert all the claim he had to the land in the former action.

This rule is fundamental, and we have neither the time nor inclination to elaborate it.

II. There were a number of parties defendant to the present action. The only parties who appealed from the decree were Phoebe A. Bullard, the wife of E. F. Bullard, who was an original defendant, and E. G. Bullard and H. B. Bullard, the sons of E. F. Bullard, who made themselves parties by intervention. It is only necessary to say that the decree of the court below was right as to Phoebe A. Bullard. She is the wife, not the widow, of E. F. Bullard, and her inchoate right of dower was cut off by the decree in the former action. The intervenor, E. G. Bullard, claims title by a quitclaim deed made by Edward F. Bullard to him on the twenty-sixth day of January, 1885, and H. B. Bullard claims as holder of a three thousand dollar mortgage upon the premises, which was assigned to him by the executors of one Esingle on the eighth day of August, 1890. The claim of these intervenors is that the quitclaim deed and the assignment of the mortgage are both grounded upon the claim of title asserted in the former action between E. F. Bullard and the plaintiff herein, and which title was held to be void. If we understand the contention of the intervenors, they seek to tack the possession of the original claimants of this land to the possession of the intervenors, and assert title by prescription and adverse possession of the land. The former adjudication settled the question of the statute of limitations based on the original possession. If there was any merit in that claim, it should have been presented in that action.

Counsel for the intervenors appears to be laboring under the impression that actual possession of land for five years, claiming title adverse to the owner, is a good defense to an action to quiet title. We need not cite the statute on this subject. The possession must be exclusive, actual, open, notorious, and under color of title or claim of right for ten years, to be available under our statute of limitations. There was no such possession in this case.

The decree of the district court is **AFFIRMED**.

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THE STATE OF IOWA, Appellee, v. O. E. SHANNON, Appellant.

**Conspiracy: CONVICTION: APPEAL.**

*Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.*

WEDNESDAY, OCTOBER 18, 1893.

THE defendant was indicted and convicted of conspiracy, and appeals.—*Affirmed.*

No appearance for appellant.

*John Y. Sions, Attorney General, for the State.*

BY THE COURT.—This case is submitted on a transcript which contains a copy of the indictment, notice of appeal, appeal bond, and record entry of judgment, only. We have carefully examined the entire record before us, and discern no error. **AFFIRMED.**

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THE STATE OF IOWA, Appellee, v. RICHARD TYNER, Appellant.

**Seduction : CONVICTION: APPEAL.**

*Appeal from Fremont District Court.*—HON. H. E. DEEMER, Judge.

WEDNESDAY, OCTOBER 18, 1893.

INDICTMENT for seduction. There was a verdict of guilty, and a judgment thereon, from which the defendant appealed. The cause was submitted by the attorney general on a partial transcript.—*Affirmed.*

No appearance for appellant.

John Y. Stone, Attorney General, for the State.

BY THE COURT.—The transcript contains certified copies of the indictment, the instructions of the court, and the record entries. No part of the evidence is in the record. With a due examination of the record, no error is apparent, and the judgment will stand. **AFFIRMED.**

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THE STATE OF IOWA, Appellee, v. CHARLES E. HUNT, Appellant.

**Liquor Nuisance : CONVICTION: APPEAL.**

*Appeal from Polk District Court.*

WEDNESDAY, OCTOBER 18, 1893.

THE defendant was indicted, tried, and convicted of the offense of maintaining a nuisance by the sale of intoxicating liquors, and he appeals.—*Affirmed.*

No appearance for appellant.

John Y. Stone, Attorney General, for the State.

ROTHBROOK, J.—The judgment was entered in the court below on the thirty-first day of October, 1892, and an appeal was taken in November of that year. The defendant has given no further attention to the matter, and the appeal is presented to this court upon a transcript of the indictment and judgment and notice of appeal. No error appears from the record thus presented, and the judgment of the district court is **AFFIRMED.**

DAVID MAGEE, Appellant, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellee.

**Personal Injury: CONTRIBUTORY NEGLIGENCE: EVIDENCE.**

*Appeal from Mahaska District Court.—HON. DAVID RYAN, Judge.*

WEDNESDAY, OCTOBER 18, 1893.

ACTION for damages for a personal injury sustained by one T. G. Klepper, Jr., a brakeman on one of the defendant's trains. Klepper stepped off a moving train upon a depot platform, and fell upon the platform, and rolled between the platform and the cars, and his right hand was crushed and injured so that amputation above the wrist became necessary. Klepper assigned his claim for damages to the plaintiff. There was a trial by jury, and, when the plaintiff had introduced his evidence in support of the cause of action, the defendant made a motion that the court should instruct the jury to return a verdict for the defendant. The motion was sustained, and, upon the verdict thus returned, the court rendered a judgment, from which the plaintiff appeals.—*Affirmed.*

*G. W. Lafferty and G. C. Morgan, for appellant.*

*Hubbard & Dawley, for appellee.*

ROTHROCK, J.—The case has once before been in this court upon an appeal by the defendant, and was reversed upon the ground that there should have been a verdict for the defendant because it did not appear that the defendant was properly chargeable with negligence, and because Klepper was negligent in alighting from the car as he did. The facts as they appeared on the first trial are quite fully set forth in the former opinion, and need not be repeated here. See 82 Iowa, 249.

It is claimed in behalf of the appellant that the case now presented is different, both in pleading and fact, from that presented on the former appeal. It is true that certain amendments were made to the petition, and some of the witnesses testified to additional facts, on the last trial, but all these amendments do not change the fact that Klepper negligently stepped from the car upon the platform, and fell because the car was going in a direction opposite to that in which he supposed it was moving; and a careful examination of all the evidence, as now presented, leads us to the conclusion that the court properly instructed the jury to return a verdict for the defendant. The additional facts testified to by witnesses on the last trial are not so different from what they were on the first trial as to warrant a different conclusion from that reached upon the former appeal.

The judgment of the district court is **AFFIRMED.**

TOWN OF BLOOMFIELD, Appellee, v. L. C. McAVOY, Appellant.

**Criminal Cause: APPEAL: RECORD.**

*Appeal from Davis District Court.*—HON. CHARLES D. LEGGETT, Judge.

THURSDAY, OCTOBER 19, 1893.

BY THE COURT.—The defendant was convicted in mayor's court of a violation of an ordinance of the town of Bloomfield, and appealed to the district court, in which he was again found guilty. From the judgment of that court he appeals. The cause is submitted in this court without argument for either party, on a transcript which shows that the defendant was tried in the district court by jury, and found guilty as charged in the information. A new trial was asked on the grounds that the verdict was contrary to the evidence, and contrary to the instructions of the court, and was denied. The transcript submitted does not contain the evidence nor the instructions, and there is nothing before us to indicate that there was any error in the proceedings, prejudicial to the defendant.

The judgment of the district court is therefore **AFFIRMED**.

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THE STATE OF IOWA, Appellee, v. JOHN NEWMAN, Appellant.

**Nuisance: CONVICTION: APPEAL.**

*Appeal from Polk District Court.*

THURSDAY, OCTOBER 19, 1893.

THE defendant was indicted and convicted of the crime of nuisance, and judgment entered against him, from which he appeals.—*Affirmed*.

No appearance for appellant.

*John Y. Stone, Attorney General, for the State.*

BY THE COURT.—The case was submitted upon a partial transcript, showing the indictment, judgment, notice of appeal, and appeal bond. We do not discover any error in the record before us. The judgment of the district court is therefore **AFFIRMED**.

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W. D. G. COTTRELL *et al.*, Appellants, v. WHEELER & MOFFIT *et al.*;  
WM. B. PIATT *et al.*, Administrators, Appellees.

**Judgment: ASSIGNMENT : EVIDENCE.**

*Appeal from Cedar District Court.*—HON. J. H. PRESTON, Judge.

FRIDAY, JANUARY 19, 1894.

SUMMARY proceeding for judgment against the defendants. Judgment rendered for the intervenors, from which the plaintiffs appeal.  
—*Affirmed.*

*Wolf & Hanley*, for appellants.

*Charles B. Keeler*, for intervenors, appellees.

KINNE, J.—This is a summary proceeding for judgment against the defendants, who are practicing lawyers of Tipton, Iowa, for one thousand, three hundred and seventy-seven dollars, which it is alleged they have collected upon a judgment belonging to the plaintiffs, and refuse to pay over. The facts, as disclosed by the pleadings and on the hearing, are that on March 26, 1878, Piatt & Carr and I. M. Preston, as attorneys, procured a judgment for five thousand dollars against one Mink, and in favor of Maria D. Shaffer; that the firm of Piatt & Carr, composed of H. C. Piatt and H. C. Carr, were practicing attorneys at Tipton, Iowa, and said firm was dissolved in October, 1887; that a portion of said judgment was on March 20, 1883, made by sale of real estate of the defendant in the judgment; that H. C. Piatt died in November, 1888; that prior to his death, and in March, 1883, the plaintiff in said judgment assigned the same to H. C. Piatt; that at all times prior to said assignment they were attorneys for the collection of the judgment; that after said assignment, and until the dissolution of said firm, they continued to act as such attorneys for H. C. Piatt; that, after the dissolution of said firm, H. C. Carr took charge of said judgment for the collection thereof for Piatt & Carr, and turned it over for collection to the defendants, Wheeler & Moffit, who have collected upon said judgment the sum of one thousand, three hundred and seventy-seven dollars, which is conceded to be due the real owner of the judgment; that Wheeler & Moffit have always stood ready to pay said sum whenever it should be adjudged to whom it belonged. The executors of H. C. Piatt intervene, claiming to be the owners of the judgment, and entitled to the proceeds in the hands of Wheeler & Moffit. The plaintiffs claim that on March 20, 1883, and prior to the sale of the real estate of the defendant in the judgment, they, through Piatt & Carr,

attorneys, purchased the judgment, and still own the same, and hence are entitled to the money made thereon, and in the hands of Wheeler & Moffit. They also claim that the latter firm and Carr were employed by them to collect the balance due on the judgment. These claims are denied. The court below found in favor of the intervenors, ordering the money to be paid to them, and, from this order and judgment, the plaintiffs appeal.

I. There is but one question involved in this appeal, viz: Who owned the judgment upon which the one thousand, three hundred and seventy-seven dollars now in the hands of Weeeler & Moffit was collected? The plaintiffs' claim thereto is based upon an alleged oral agreement of H. C. Carr with them, whereby they became the purchasers of the judgment, prior to the sale of the real estate in part satisfaction of it. Intervenor's claim is that H. C. Piatt purchased the judgment, and remained the owner of it until his death.

It will serve no useful purpose to review in detail the evidence. As to this alleged sale, it is in direct conflict, the plaintiffs testifying to the purchase, and Carr denying it. There are, however, facts, some of which are undisputed, which we think justified the district court in finding for the intervenors. There was no claim that H. C. Piatt had personally sold or assigned the judgment, or that any written assignment had been made by anyone. The contention is that Carr, acting as attorney for H. C. Piatt, verbally sold the judgment to the plaintiffs. But there is no evidence showing that Carr had authority to make any sale of the judgment. He was simply acting as an attorney for Piatt for the collection of the judgment. Now, the evidence of the plaintiffs is that they were by this purchase to have the judgment for four thousand, one hundred and three dollars, the face value of which was five thousand dollars. It is well settled that an attorney having a claim for collection has no power, in the absence of special authority, to accept as payment a less sum of money than the whole sum due. *McCarver v. Nealey*, 1 G. Greene, 362; *Drain v. Doggett*, 41 Iowa, 684; *Harbach v. Colvin*, 73 Iowa, 641; *Bigler v. Toy*, 68 Iowa, 687; Mechem on Agency, section 813; 1 Am. & Eng. Encyclopedia of Law, p. 957. Nor could Carr's authority to sell the judgment be established by his own acts or declarations. *Bigler v. Toy*, 68 Iowa, 689. There is nothing to show that H. C. Piatt ever ratified the acts of Carr in respect to the sale of the judgment, if he undertook to make such a sale. It does not appear that Piatt ever knew of such sale or that the plaintiffs claimed to have purchased the judgment. Without knowledge of the thing done, he could not ratify. *Davenport Saving, etc., Ass'n v. North American Fire Ins. Co.*, 16 Iowa, 78. Again, the letters of the plaintiff Cottrell tend strongly to show that it was the land that was to be, and afterwards was, sold on the judgment, and that he wanted to and did purchase, and not the judgment. In one letter he wants Carr to inform him whether he will be safe in buying it, and whether the mortgages on it can be paid. In another, he speaks of the purchase of the Mink property. In fact, the whole tenor of the correspondence between the plaintiff Cottrell and Carr is in harmony with

Carr's testimony that he never sold the judgment to the plaintiffs. The burden is upon the plaintiffs to establish their case, to show a purchase of the judgment.

In the light of the testimony of Carr, supported, as it is, by the record, we do not think the plaintiffs have shown that they are entitled to recover. Giving the finding of the court below the force and effect of a verdict, as we should, the plaintiffs have not made such a case as justifies us in disturbing the judgment of the district court. In the view we have taken of the case, we need not pass upon the questions raised in the motion. **AFFIRMED.**

**ROTHBROOK, J., took no part in this case.**

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1. *Railroads—injury to employee—settlement—fraud.* Where a settlement with a brakeman, on account of damages sustained from a personal injury, was procured by a railroad company under representations that all of the eyewitnesses of the accident in which the injury was received were against him as to the cause of the accident, which was untrue, and that the superintendent of one of the divisions of the road had yard work which said brakeman could do, that he would put him to work, and that he could always have work as long as he behaved himself, when in fact said superintendent did not have any positions in the yards, and the brakeman was refused work after several applications, and after waiting a reasonable time therefor, and the jury found that the brakeman was not in such a condition mentally at the time of the settlement as to be able to attend to business, and understand the nature and effect of the release when he signed it, *held*, that the settlement was not a bar to an action for damages for the injury sustained. *O'Brien v. C., M. & St. P. Ry Co.*, 644.

2. *Settlement—rescission on account of fraud—action without tender of benefits received.* The settlement with the plaintiff having been procured by fraud, and he being entitled to retain the benefits received thereunder, either by virtue of said settlement or of the defendant's original liability, *held*, that a tender of the return of the amount received under the settlement was not necessary before an action could be maintained upon the original liability of the defendant. *Id.*

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2. *Amended abstract—time for filing—unnecessary record—costs.* An amended abstract, filed by an appellee, will not be stricken from the files because not filed within the time required by the rules of the supreme court, when no prejudice has resulted. But where such abstract sets out matter fully presented in the abstract of the appellant, and gives some of the evidence in the form of question and answer, the court will make such an apportionment of the costs thereof as may be just in the premises. *Boggs v. Douglas*, 150.

3. *Amended abstract—delay in filing.* An amended abstract, filed by appellee, will not be stricken from the files, because of its not having been filed within the time required by the rules of the supreme court, when no prejudice has resulted to the appellant. *Rosenbaum Bros. v. Horton*, 692.

4. *Review of order on motion—evidence not preserved.* An order of the district court will not be reviewed by the supreme court where it appears that the evidence presented in the district court has not been preserved. *Smith v. Harrington*, 603.

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5. *Matters not subject of dispute below.* The plaintiff's petition alleged that one S. was the "sole and only heir at law" of the owner of certain real estate, and the answer excepted from its denial of the allegations of the petition the fact of the relationship of S. to said owner. Held, that, it not having been questioned in the district court that S. was the only heir, the admission of the answer would be considered in the supreme court as intended to admit the allegation of the petition in regard to the heirship of S. *Byers v. Johnson*, 278.

APPEAL. QUESTIONS CONSIDERED ON APPEAL. *Continued.*

6. *Questions raised for first time on appeal.* Questions which do not arise under the issues in a cause, and which are raised for the first time on appeal, will not be considered by the supreme court. *Machine Co. v. Richardson*, 525; *State v. Baker*, 188; *Byers v. Johnson*, 278.

7. *Claims inconsistent with procedure in trial court.* Where the allegations of an amendment to a petition are treated as denied on the trial in the district court without the filing of any pleading by the defendant, the plaintiff can not claim upon appeal that the facts alleged must be regarded as admitted. *Wright v. Waddell*, 350.

8. *Evidence—objections too late on appeal.* The supreme court will not consider objections to rulings on evidence, when it appears that such objections were not made in the court below. *Riepe v. Elting*, 82.

9. *Instructions—when properly refused—objections too late.* Alleged error in giving an instruction can not be considered in this court, where no objection was made to it when given, and the giving of it has not been assigned as error. And it is not error to refuse instructions asked, when, so far as they are correct and applicable, they are substantially embraced in the charge given. *Id.*

10. *Objections to decree by appellee.* Upon an appeal from a part only of a decree in equity, the supreme court will not consider objections raised by the appellee to that part of the decree from which no appeal has been taken. *Boggs v. Douglas*, 150.

11. *Proper computation of amount of decree.* The supreme court will not consider mere questions of the proper computation of the amount of a decree in an equity cause, unless the matter has been presented specially to the district court. *Doud v. Blood*, 237.

12. *Criminal law—witness not before grand jury—examination on motion—election and waiver by defendant.* When the prosecuting attorney has obtained leave, upon motion under section 4421 of the Code, to examine a witness who was not before the grand jury, and of whose evidence he has not given four days' notice, the defendant is entitled to elect whether he will take a continuance or go on with the trial, and where his counsel announces to the court: "Saving our exceptions to the rulings of the court, we will go on with the trial," he can not have the ruling reviewed upon appeal. *State v. Kidd*, 64.

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14. *Error cured by instruction.* When testimony erroneously admitted is taken from the jury by a proper instruction, the error is cured, and is no ground for a reversal. *State v. Crafton, 109.*

15. *Technical objections—instructions to jury.* A cause will not be reversed in the supreme court because of technical objections to the charge of the trial judge to the jury which could not have misled the latter in arriving at its verdict. *Cameron v. Bryan, §14.*

16. *Error without prejudice—instructions to jury.* The fact that the statement of the issues in a court's charge to the jury might properly have been made more specific is not ground for the reversal of a judgment on appeal, where it appears that the appellant has not been prejudiced by reason of such error. *Lowe v. C., St. P., M. & O. Ry Co., 420.*

17. *Instructions to jury—error without prejudice.* A cause will not be reversed on the grounds that the instructions to the jury are not as clear as they might have been, and that in one or two instances therein the court referred to the garnishee as defendant, when the charge as a whole announces correct principles of law applicable to the case, and it is apparent that no prejudice has resulted. *Citizens' State Bank v. Fuel Co., 618.*

18. *Leading questions—error without prejudice.* The allowance of leading questions and the admission, in evidence, of the conclusions of a witness are not grounds for the reversal of a cause, where it appears that in the subsequent course of the trial every fact and circumstance connected with the subject of the witness' testimony were given in detail. *Mucci v. Houghton, 608.*

19. *Error in amount of judgment for nominal sum.* The personal earnings of an artist for painting pictures are exempt from execution under section 3074 of the Code. A judgment of the district court holding such earnings exempt will not be disturbed upon appeal because the amount thereby secured to the debtor includes a nominal sum for the cost of the materials. *Millington v. Laurer, 322.*

## ARBITRATION AND AWARD.

## VALIDITY OF AWARD.

*Oath of arbitrators—presumption—election of remedies.* Where the report of arbitrators fails to show affirmatively that the arbitrators were sworn, it will be presumed, in the absence of a showing to the contrary, that the arbitrators complied with the law in this respect, or that the parties waived their making an affidavit, and if the submission and award otherwise conform to the law relating to arbitration, the party in whose favor the award is, can not, after it is rendered and placed in the hands of the clerk of the court, at his election, sue thereon or pursue the statutory provisions for judgment, but must be content with the further statutory remedies. *Older v. Quinn, 445.*

ASSIGNMENT.

RIGHTS OF ASSIGNEE.

1. *Personal earnings of debtor assigned to nonresident.* Under an assignment of the personal earnings of a debtor, made within ninety days from the time the services were rendered, the rights of the debtor under the statute, exempting such claim from execution or attachment, pass to the assignee, although the latter be a nonresident of the state. *Millington v. Laurer, 322.*

2. ——— *right of set-off.* Such a claim is not subject in the hands of the assignee to a set-off for the amount of a judgment existing against the assignor at the time the assignment was made. *Id.*

See Conveyances, 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

VALIDITY.

1. *Proceeding to determine is one at law.* A proceeding to determine the validity of objections to the report of an assignee for the benefit of creditors is one at law. *In re Assignment of Cadwell's Bank, 533.*

REPORT OF ASSIGNEE.

2. *Report of claims filed—what essential.* Under section 2120 of the Code, requiring assignees for the benefit of creditors, after three months, to file with the clerk of the court a list of all creditors of the assignor who have filed their claims with the assignee, "with a statement of their claims," the assignee must show in his report or by reference to proofs on file, and which are accessible, such facts in regard to the claims filed as will enable any person interested to investigate the claims and reach a conclusion in regard to their validity; and where a report is insufficient in this regard an objecting creditor will not be concluded by his failure to file exceptions thereto within three months after the filing of the report, as required by section 2121 of the Code. *Id.*

3. *Filing of claims with assignee—form—sufficiency.* An assignee is not required to report a claim filed with him, unless he is furnished by the creditor with such information as he is required to set out in his report. *Id.*

PAYMENT OF CLAIMS.

4. *Payment of illegal claims by assignee—justification.* Where the assignee of a partnership and of the estates of the individual partners, reported the claims filed against the respective estates merely by giving the names of creditors, the amount of their claims, and the character thereof, and after the expiration of three months the court ordered the "equitable distribution" of the money in the hands of the assignee among the creditors who had proven their claims, *held*, that said order of court was not an adjudication of the validity of the

## ASSIGNMENT FOR BENEFIT OF CREDITORS. PAYMENT OF CLAIMS.

*Continued.*

claims filed, and did not justify the payment, in full, of the claims filed against the estate of one of the individual partners, but which were in fact claims against the partnership, where it appeared that the funds in the hands of the assignee were insufficient to pay the partnership creditors in full. *Id.*

5. *Election of creditor of partnership to look to estate of individual partner.* A creditor of an insolvent firm can not by waiving the right to enforce his claim against the partnership assets, receive payment out of the estate of one of the partners to the prejudice of other partnership creditors. *Id.*

## ALLOWANCE TO ASSIGNEE.

6. *Proceedings for removal of assignee—resistance—attorney fees.* Expenses incurred by an assignee for attorney fees in resisting proceedings for his removal, which were without merit, and which were ultimately dismissed by the court, are payable out of the funds of the estate. *Id.*

## ATTACHMENT.

## GROUNDS.

1. *Nonresidence—evidence.* A farmer temporarily residing in this state for the purpose of feeding cattle, with the expectation of ultimately returning to Kansas, where his wife and children reside, is not a resident of this state. *State Bank v. Jennings, 230.*

## PLEADING.

2. *Amendment to petition—effect.* Where in an action by attachment upon a promissory note the defendant answered, under oath, denying the signature to the note, or that he authorized the same, and thereupon the plaintiff amended his petition by adding a second count, asking to recover upon an open account in the same amount, and alleging that said count was upon the same cause of action set out in the original petition, and upon this count the jury found that the plaintiff was entitled to recover, *held*, that the attachment was not wrongfully sued out because of the plaintiff's failure to recover upon the count in his original petition. *Id.*

3. ——— *counterclaim.* Both of said counts of the petition being upon the same cause of action, *held*, that a counterclaim for malicious prosecution, which had not matured at the time of the filing of the original petition, was not available as against said second count. *Id.*

## PRIORITY OF LIENS.

4. *Conveyance made after levy.* The attachment herein being valid under the amendment to plaintiff's petition, *held*, that a petition of

**ATTACHMENT. PRIORITY OF LIENS. *Continued.***

intervention claiming the attached property under a conveyance made after the levy of the attachment under the original petition, but before the filing of the amendment was properly dismissed. *Id.*

**DAMAGES.**

5. *Malice—exemplary damages.* Evidence in an action aided by attachment that the plaintiff knew that some of the grounds alleged for the issuance of the writ were false, and that he had no reason to believe that any of them were true, is sufficient to support a verdict for exemplary damages. *Wright v. Waddell, 350.*

**SUPPLEMENTAL PROCEEDINGS.**

See Equity, 4.

**ATTORNEYS.****FEEs.**

1. *Liquor nuisance.* An attorney fee of one hundred dollars for the plaintiff's attorney, in an action to enjoin a liquor nuisance, is not excessive where it appears that the case was vigorously contested, and that four days were required for the hearing, for a preliminary injunction, and for final trial. *Nichols v. Thomas, 394.*

2. *Proceedings for removal of assignee—resistance.* Expenses incurred by an assignee for attorney fees in resisting proceedings for his removal, which were without merit, and which were ultimately dismissed by the court, are payable out of the funds of the estate. *In re Assignment of Cadwell's Bank, 533.*

**MISCONDUCT.**

3. *Misconduct of counsel in argument to jury.* Where counsel, in the course of his argument to the jury, read to it certain interrogatories which were to be submitted to it for its special findings, informed it that its special and general verdicts should be consistent, and told it what its findings should be to support a verdict for his client, *held*, that such conduct was not objectionable, and was not, therefore, ground for new trial. *Powell v. Chittick, 513.*

**AUCTIONS.** See Sales, 15.

**BAIL.** See Criminal Law.

**BASTARDY.** See Criminal Law.

**BILLS AND NOTES.****NEGOTIABILITY.**

1. *Promissory note—provision for attorney fees.* The negotiability of a promissory note is not affected by an agreement therein to pay "ten per cent. attorney's fees, if placed in the attorney's hands for collection." *Shenandoah Nat. Bank v. Marsh, 273.*

BILLS AND NOTES. *Continued.*

## INDORSEMENT.

2. *Bank checks—indorsement in blank—effect of—custom.* Where a check upon a bank, drawn in favor of a payee named, or bearer, was indorsed in blank by the payee, and delivered by him to the bank where he did business, which gave him credit therefor, *held*, that the title to the check passed to the bank, according to the law merchant, and that evidence to the effect that it is the custom of bankers, when a check is drawn upon one bank and presented to another, to give credit for the check, but that such credit is treated as a receipt merely, and not as payment, is not admissible to negative the ownership of the check by the bank receiving it. *Shaw & Schoonover v. Jacobs*, 713.

3. ——— *signature of indorser—genuineness—evidence.* In an action upon a check by the indorsee of the payee against the drawer, evidence as to the genuineness of the signature or the payee in the indorsement is properly excluded, where the payee has not denied the genuineness of his signature in writing, under oath, as provided by section 2730 of the Code. *Id.*

## BONDS.

## REFORMATION.

1. *Bond of executor—mistake—liability of sureties.* The bond of the executor of the estate of O. recited that he had been by the court appointed executor "to execute his last will and testament," and was conditioned for the faithful discharge of his duties as such executor. Following the obligation of the bond, and on the same page, was the oath "as executor of the estate of O. deceased," but neither the name nor the estate of O. was elsewhere mentioned in the bond. The bond was filed with the clerk of the court, however, and treated throughout the proceedings upon said estate, as that of the executor of the estate of O. *Held*, that it appearing that the intention of the parties was to execute a bond for the benefit of the estate of O., and they having failed to express such intention through inadvertence or mistake, equity would reform the bond so as to make it conform to the intention of the parties, and that the sureties were liable upon the bond thus reformed. *Foley v. Hamilton*, 686.

2. ——— *evidence.* It appearing that said executor was never appointed by the court, having jurisdiction of the estate of O., to execute any other will than that of O., that he was previously appointed one of the temporary administrators of the estate of O., when the same sureties were his bondsmen, that upon the bond in controversy appeared his oath as executor of O.'s will, and that said bond was approved and filed as his bond in that estate, and that under it he was commissioned, and proceeded to administer on said estate, *held*, that the evidence supported the finding that it was the will of O., which said executor was appointed to execute, and that the sureties intended the bond in question for him as such executor, and warranted the reformation of the bond accordingly. *Id.*

## BOUNDARIES.

## PROCEEDINGS TO ESTABLISH.

1. *Proceeding before commissioners—sufficiency of notice.* The proceedings of commissioners appointed by a court to establish boundaries will not be held void because of the failure to give formal notice of the survey and bearings to a party in interest, where it appears that such party and one of his attorneys knew, when testimony was being taken, and testified before the commission, that they declined to furnish other evidence, though requested to do so, and that the attorney was with the commissioners when the survey was made. *Neary v. Jones, 556.*

2. *Survey—location of corner—evidence.* Upon proceedings before commissioners to fix the boundary between two city lots, evidence having been introduced showing that one of the corners of the block in which the lots were situated had never been lost or in dispute, and the commissioners tested the location of the corner by measurements and alignments to original corners not in dispute, which showed that the corner was correctly located, *held*, that the commissioners were justified in making such corner the starting point of their survey, and that the survey was not subject to objection because a certain corner marked by a permanent monument was not made the starting point, though in such event a different result would have been obtained. *Id.*

BURGLARY. See Criminal Law.

CHATTEL MORTGAGES. See Mortgages of Personal Property.

## CONSTITUTIONAL LAW.

## EMINENT DOMAIN.

*Construction of waterworks—necessity for taking property.* Section 474 of the Code granting power to cities to condemn so much private property as may be "necessary for the construction and operation" of waterworks, does not authorize the taking of private property on which to lay a railroad track for the purpose of conveying the materials used in the construction of said waterworks, and the coal used in their operation, from the railroad station in a town to a point a mile and three quarters distant, where the waterworks are to be constructed, at least where it appears that a public road, much used for travel, though somewhat hilly, and at times impassable on account of mud, leads from the railroad station to said waterworks. Neither can such power be exercised, however necessary, to enable a waterworks company to ship ice cut on its reservoir. *Creston Waterworks Co. v. McGrath, 502.*

CONTEMPT OF COURT. See Intoxicating Liquors, 5, 6, 7.

## CONTINUANCE.

## · SUFFICIENCY OF APPLICATION.

1. *Diligence—good faith.* An application for a continuance on the ground of the absence of witnesses should be overruled where it appears not to have been made in good faith, and that the applicant has not used due diligence to procure the testimony desired. *State v. Belvel*, 405.

## COUNTER AFFIDAVITS.

2. *Absence of witnesses—motion to strike.* While a resistance to a motion for a continuance, on the ground of the absence of witnesses, can not be supported by affidavits to contradict statements contained in the affidavits filed in support of such motion as to what the testimony of the absent witnesses will be, it is competent to show want of diligence to procure the testimony desired. And, where a defendant in a criminal cause moved to strike all of the affidavits filed by the state in resistance to a motion for a continuance, portions of which only were objectionable, *held*, that the motion was properly overruled. *Id.*

## CONTRACTS.

## ASSENT.

1. *Compromise—consideration—acceptance—effect.* A mutual fire insurance company, having its office in Iowa, sent to a bank in Nebraska a draft for about sixty-seven *per cent.* of a loss payable there, with instructions to deliver the same to the plaintiff upon her signing a receipt that such amount "was in full payment and compromise settlement of all claims and demands" for the loss in question, and that in consideration of such payment the said insurance company was thereby "discharged forever from all further claim by reason of said fire, loss and damage." The insurance company did not claim that the amount of such draft was the full amount of the loss due under said policy, but that as a mutual insurance company it was only bound to pay the share of such loss in the amount collected upon assessments of premium notes, and that said draft represented such sum. The plaintiff on the other hand insisted that the contract of insurance required the company to pay the loss under said policy in full. The plaintiff having indorsed the draft, and left it with the bank for collection, for the purpose of bringing the amount thereof within the jurisdiction of the courts of Nebraska, and subject to an attachment, which she caused to be issued in an action against the defendant on said policy, *held*, that the plaintiff's indorsement of said draft was in effect an acceptance thereof upon the condition under which it was tendered, although the receipt was not signed, and that the liability of the insurance company under said policy was thereby discharged. *Keck v. Fire Ins. Co.*, 200.

CONTRACTS. ASSENT. *Continued.*

2. *Sales—orders—acceptance necessary to complete contract.* An order or request in writing, addressed 'to a dealer or his agent, to ship to the writer, on or about a date named, goods of a kind specified, for which the writer agrees to pay a price named, does not constitute a contract until accepted or acted upon by the vendor, and may be withdrawn at any time before acceptance. Hence, where such an order directed that the goods specified be shipped three months after the date of the order, and the vendor gave no indication of the acceptance of the order until the date named, when he shipped the goods, *held*, that the vendee was not then bound to receive them. *McCormack Harvesting Machine Co. v. Richardson, 525.*

## CONSIDERATION.

3. *Contract to convey real estate.* The plaintiff and the defendant had agreed to purchase between them a quarter section of land, the plaintiff to take the north eighty acres, and the defendant the south eighty, at prices agreed upon. The owner of the land refusing to make separate deeds, it was orally agreed that the defendant should take the deed, make the first payment with money furnished by both parties in proportion to their respective shares, execute a mortgage for the balance, and convey the north eighty to the plaintiff, who was to pay the balance of the purchase money therefor to the defendant. *Held*, that the contract was not without consideration, nor lacking in mutuality. *Nilles v. Welch, 491.*

4. *Landlord and tenant—written lease superseded by verbal lease.* Where a written lease of lands for a term of years was terminated by an oral agreement of the parties, whereby the lessee paid the rent in arrears, and agreed to vacate, but subsequently a verbal lease was agreed to upon new terms and conditions, and in pursuance thereof the lessee remained upon the land at the same rent, and the lessor in part made certain improvements agreed to be made, *held*, that the verbal lease was not a mere modification of the written lease, but a new contract, and that both parties having by their acts recognized the termination of the written lease, and attempted a performance of the verbal lease, it was immaterial whether there was a new consideration for the latter or not. *Evans v. McKenna, 362.*

## CONSTRUCTION.

5. *Construction of levee—estimates of engineer—relief.* Under a contract for the construction of a levee, to be paid for at a price named per yard, upon estimates made by the county engineer, who was to be "the sole judge of the quality and quantity of all said work," the estimates made by the engineer are conclusive upon the parties in the absence of fraud, mistake, or some other wrong which ought to entitle a party disputing such estimates to relief. *Edwards v. Louisa Co., 499.*

CONTRACTS. CONSTRUCTION. *Continued.*

6. *Liquidated damages—evidence.* Where a contract for the erection of a house provided that if the builder "should fail to comply with the terms of this contract which relates to the time within which said work or parts thereof are to be completed," he should "forfeit ten dollars *per diem* for each and every day thereafter, until the completion of the work," which sum the owner was authorized to deduct from any moneys due the builder, and if such amount should not be due the latter, the builder agreed to pay the same, and there was no evidence as to the cost of said house, nor of its rental value, *held*, that the sum named must be construed as liquidated damages. *Degraff, Vrieling & Co. v. Wickham, 720.*

7. *Intention—burden of proof.* In such case the burden of proof upon the question of the rental value of said premises is upon the party contending that said provision in the contract should be construed as a penalty. *Id.*

## SPECIFIC PERFORMANCE.

8. *Conditions—waiver.* The sum paid by the plaintiff was ten dollars short of the amount agreed to be paid by him, but was received by the defendant without objection, upon the promise of the defendant to pay him the balance. *Held*, that the payment of the full amount at the time was waived. *Nilles v. Welch, 491.*

## STATUTE OF FRAUDS.

9. *Consideration paid in part.* The defendant having received the portion of the purchase money to be paid by the plaintiff under an agreement for the purchase of land, and used the same for the purchase of the property, *held*, that the contract was not within the statute of frauds. *Id.*

## CONVEYANCES.

DELIVERY. See Mortgages of Personal Property, 1.

## CONSTRUCTION.

1. *Reservation of mining right in deed.* The claimants to certain real estate, while the title thereto was still in the government, transferred all their interest therein to an adverse claimant, reserving to themselves, however, the privilege of mining and drifting any crevice or range struck by them on their own ground through the land conveyed, and reserving, further, the privilege of sinking shafts on the latter by paying to said grantee one sixth of all the mineral discovered or raised, as rent on the conveyed premises. Subsequently said grantee acquired title to said premises from the government, and by successive conveyances, made subject to the rights of the above grantors, they became the property of the plaintiff's deviser. The defendant claims to have acquired said mining right by purchase from said grantors, or those claiming under them, and had mined on said

CONVEYANCES. CONSTRUCTION. *Continued.*

premises almost continuously for about thirty years when this action was commenced to quiet the title thereto in the plaintiffs. Before his death the plaintiff's deviser paid the defendant for ore mined on said lands. *Held*, that the reservation in said original deed was not that of a mere life estate, which terminated with the death of the grantors in said deed, nor a personal privilege of license only, which could not be assigned, but gave the grantors and their grantees a continuing right to mine through said premises, limited only by the extent of the range that should be discovered. *Bonson v. Jones*, 380.

2. *Deed of property held in trust.* C., having purchased certain real estate with funds belonging to the estate of I., conveyed the same to I.'s widow, who, in turn, conveyed it to the executor of I.'s estate. Each of said conveyances purported on its face to convey in the grantor's own right, and there was no indication in either of them that the conveyance was in trust. After the death of I.'s widow, said executor conveyed said land to E. C., R. M., L. M. and F. M., the only surviving heirs of I., jointly, the first of whom, under the laws of descent, being entitled to one half of said property, and the others to the remaining half, but their respective interests were not specified in the deed. Thereafter L. M. and E. M. quitclaimed their respective interests to R. M., who conveyed to the plaintiffs by deed reciting, that he had granted, bargained, sold, etc., all of his right, title and interest in the property described. *Held*, that the deed to the plaintiffs was in effect a quitclaim deed, and that the plaintiffs took thereunder only the interest of R. M., which was an undivided one half. *Rogers & Maguire v. Chase*, 468.

## CANCELLATION.

3. *Fraud—agency—relief.* The plaintiff, in consideration of certain land scrip, agreed with W. to convey certain lands to such person as W. might designate. Thereupon W. negotiated a sale of the land to the defendant, to whom the land was conveyed by the plaintiff. The scrip received from W. having been found to be worthless, the plaintiff brought this action to cancel the deed to the defendant on the ground of fraud. *Held*, that, as W. was not the agent of the defendant, and the latter had no knowledge of the fraud practiced by W., the plaintiff was not entitled to the relief asked. *Belau v. Bryan*, 348.

See Mortgages of Real Estate, 6.

## CONTRACT TO CONVEY.

4. *Consideration.* The plaintiff and the defendant had agreed to purchase between them a quarter section of land, the plaintiff to take the north eighty acres, and the defendant the south eighty, at prices agreed upon. The owner of the land refusing to make separate deeds, it was orally agreed that the defendant should take the deed, make

CONVEYANCES. CONTRACT TO CONVEY. *Continued.*

the first payment with money furnished by both parties in proportion to their respective shares, execute a mortgage for the balance, and convey the north eighty to the plaintiff, who was to pay the balance of the purchase money therefor to the defendant. *Held*, that the contract was not without consideration, nor lacking in mutuality. *Nilles v. Welch*, 491.

## RECORDING.

5. *Lands located in unorganized county—construction of statute.* By an act of the legislature passed in the year 1853, Palo Alto county was attached to the county of Boone, the purposes for which it was so attached not being specified. In the year 1855 the same county was attached to the county of Webster, "for election, judicial and revenue purposes." *Held*, that a conveyance of lands in Palo Alto county, made in the year 1857, was properly recorded in Webster county, and that such record was constructive notice to a subsequent purchaser after the organization of Palo Alto county. *Meagher v. Drury*, 366.

PROOF OF. See Evidence, 5.

## CORPORATIONS.

## MEETINGS OF STOCKHOLDERS.

1. *Right to vote shares.* Where one half of the stock in a corporation was issued to B. upon his agreement to pay twenty thousand dollars, to be used in making needed changes in the plant of the company and as working capital, and thereafter certain improvements in the company's works were authorized by the corporation, which were paid for by B., and for which he was allowed by the company nearly seventeen thousand dollars, *held*, that B. being entitled as fully paid, to such number of shares as the sum thus expended by him would purchase under the terms of said agreement, he had the right to vote such number in a meeting of the shareholders of the corporation, and such shares with others admitted to be entitled to vote, being a majority of all the stock voted at a shareholder's meeting, a resolution for which B. voted all of the stock held by him, including that not paid for, was legally adopted. *Price v. Holcomb*, 123.

## SALE OF CORPORATE PROPERTY.

2. *Business operated at a loss—rights of majority.* Where the business of a corporation had been operated at a loss from the beginning, and its works had been idle for about a year, because, though solvent, it was without the necessary working capital, and was unable to secure it, and no practicable plan for putting them in operation had been suggested, though frequently discussed, and the officers of the corporation were not in accord, and it was apparent that no agreement could be reached by which the company's work's could be operated or leased, *held*, that the circumstances justified a sale of the property and business of the corporation by the action of a majority of the shareholders against the protest of the minority. *Id.*

CORPORATIONS. SALE OF CORPORATE PROPERTY. *Continued.*

3. *Permitted, though resulting in dissolution of corporation.*—Section 1060 of the Code, providing that, “no corporation can be dissolved prior to the period fixed in the articles of incorporation, except by unanimous consent,” will not prevent a sale of all the property of the corporation, by a majority only of the capital stock, when circumstances demand it, even though such sale result in the dissolution of the corporation. *Id.*

4. *Purchase by stockholder.* The relation of a stockholder in a corporation to the other shareholders and to the corporate property is not such as to preclude his becoming a purchaser of the entire corporate property at a public sale thereof. *Id.*

## COSTS.

## APPORTIONMENT.

*Establishing corners.* In view of the evidence as to the corners in question, *held*, that one half of the costs of the proceeding was properly taxed to each party. *Neary v. Jones, 558.*

## CRIMINAL LAW.

## GRAND JURY.

1. *Less number than required by law—waiver of objection.* Where, in a criminal cause, the court has jurisdiction of the person of the defendant and of the offense charged, an indictment found by a grand jury composed of five persons only, in a county where the law requires that such jury shall be composed of seven persons, is not fatally defective, and a failure to object thereto upon such ground until after a plea of guilty, and judgment thereon, will constitute a waiver of such defect. (KINNE, J., *dissenting.*) *State v. Bevel, 405.*

## INDICTMENT.

2. *Crossing bridge with steam engine—sufficiency.* An indictment charging one with driving a steam engine over bridges and culverts without planks, contrary to chapter 68 of Acts of the Twenty-fourth General Assembly, but not alleging that the accused is the owner of such engine, is fatally defective. *State v. Orr, 613.*

3. — *duplicity.* It being unlawful under said statute to drive a steam engine over “any bridge or culvert on any public highway,” an indictment charging the defendant with driving such an engine over “certain bridges and culverts on the public highway,” is bad for duplicity. *Id.*

4. *Murder—sufficiency.* An indictment charging that the defendant willfully and feloniously, deliberately, premeditatedly and of his malice aforethought, did commit an assault with deadly weapons, upon the body of a person named, and with specific intent to kill and murder such person, did willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, strike and beat said person

CRIMINAL LAW. INDICTMENT. *Continued.*

upon the head and body with an unknown weapon, and did shoot off and discharge the contents of a pistol into the head and body of said person, thereby willfully, feloniously, deliberately, premeditatedly, and, of his malice aforethought, inflicting upon the head and body of said person a mortal wound, of which she died, and which charges that said acts were committed by "lying in wait," sufficiently charges murder in the first degree. *State v. Dooley, 534.*

See paragraph 1.

## BAIL.

5. *Deposit of money in lieu of appearance bond—forfeiture after change of venue—what county entitled to money—practice.* Where one charged with a crime was bound over to appear at the district court of the defendant county, and he deposited money with the clerk in lieu of a bond, and, after indictment and two trials, in which the jury failed to agree, he took a change of venue to the plaintiff county, but the money was not transmitted with the papers to the plaintiff county, and he made default, *held*, that the district court of the plaintiff county alone had jurisdiction to declare the money forfeited, and that it should have declared it forfeited to the plaintiff county for the benefit of its school fund; but that said court, having jurisdiction of the subject-matter, and having erroneously ordered the clerk of the defendant county to pay the money to the treasurer of that county, the order was binding until set aside upon appeal, writ of error, *certiorari*, or other appropriate proceeding, and that, after a lapse of more than five years, the plaintiff county could not maintain an action against the defendant county for the recovery of the money. *Warren Co. v. Polk Co., 44.*

6. *Upon appeal—surrender of defendant in exoneration.* Sections 4593 to 4595 of the Code, providing for the surrender of the defendant in exoneration of bail, relate only to bail given on appeal from a judgment of imprisonment, and not to bail upon an appeal from a judgment imposing a fine only; and in the latter case the sureties upon the appeal bond can not surrender the defendant in their own exoneration, but must pay according to the terms of their bond. *State v. Stommel, 67.*

7. *Forfeiture—default against sureties.* Where, previous to the call of a defendant in a criminal cause for commitment to the penitentiary, following the determination of an appeal, he had been taken by the sheriff in another state, under a requisition, and surrendered at the penitentiary, and was thereby prevented from appearing in court, and his sureties from producing him, *held*, that it was error to declare a forfeiture of the defendant's supersedeas bond, and that a judgment thereon against the sureties should be set aside. *State v. Row, 581.*

CRIMINAL LAW. *Continued.*

## PRACTICE AND PROCEDURE.

8. *Reading indictment to jury—assistant to county attorney.* The provision of the statute that the clerk or prosecuting attorney shall read the indictment, and state the defendant's plea to the jury, is sufficiently complied with when that duty is performed by one who is assisting the county attorney under the employment of private parties. *State v. Crafton, 109.*

9. *Opening statement and argument.* Counsel for the state, in the opening of a criminal trial, may properly state what, from all the circumstances, he in good faith expects to prove, even though it turns out that the evidence does not fully support his statement; and, in the argument, he may not only discuss the testimony, but may properly deduce therefrom facts which may be legitimately inferred from what appears in the record. *Id.*

10. *Jury in charge of unsworn bailiff—new trial.* The requirement of section 4442 of the Code, that the jury, when it retires to deliberate upon its verdict, shall be in charge of a sworn officer, is mandatory; but the fact that the bailiff who had charge of the jury in a criminal case was not sworn was no ground for a new trial, under section 4489 of the Code, where there was no showing that any prejudice resulted to the defendant from the fact that the bailiff was not sworn. *Id.*

11. *Witness not before grand jury—examination on motion—election and waiver by defendant.* When the prosecuting attorney has obtained leave, upon motion under section 4421 of the Code, to examine a witness who was not before the grand jury, and of whose evidence he has not given four days' notice, the defendant is entitled to elect whether he will take a continuance or go on with the trial, and where his counsel announces to the court: "Saving our exceptions to the rulings of the court, we will go on with the trial," he can not have the ruling reviewed upon appeal. *State v. Kidd, 54.*

12. *Misconduct of prosecuting attorney—reference to defendant's failure to testify.* Where the defendant's attorney, in his opening remarks to the jury, on a trial for forgery, stated that, if the case went so far that the defendant's evidence would be introduced, they would show who the guilty parties were; and the prosecuting attorney, referring thereto in his closing argument, said, in substance: "If the defendant or his attorney knew who the guilty party was, why did not they come on and prove it? The fact that they did not do so shows guilt;" *held*, that these last remarks were not a violation of the statute which forbids the state to refer in argument to the fact that the defendant has failed to testify in his own behalf. *Id.*

13. *Misconduct of prosecuting attorney—offer of incompetent evidence—prejudice—new trial.* In a prosecution for burglary, the county attorney offered, in the presence of the jury, to prove that the defendants

CRIMINAL LAW. PRACTICE AND PROCEDURE. *Continued.*

had pleaded guilty to a burglary committed by them in another county. The evidence was rejected upon the defendant's objection, but the defendants, after a verdict of guilty, made the offer of the evidence a ground for a motion for a new trial. *Held*, that, while the offered evidence was clearly incompetent, and the very fact of offering it might have been prejudicial to the defendants, and the granting of a new trial on that ground would have been approved by this court, yet, whether the defendants were actually prejudiced was a question to be decided by the district court, in the exercise of a wise discretion, and, that court having denied a new trial on the ground stated, the supreme court would not interfere. *State v. Gadbois*, 25.

## EVIDENCE.

14. *Homicide—admission of accused—weapon used as evidence.* The fact that the defendant, in a prosecution for homicide, admits the killing, is not a ground for the exclusion of the weapon, with which the crime was committed, from evidence. *State v. Jones*, 182.

15. *Dying declarations.* The declaration of one criminally assaulted, "I am killed; I was helping Charlie," made at a time when the party was aware that he must surely die, is competent evidence of what the deceased was doing when he received the injury, which resulted in his death. *Id.*

16. *Seduction—evidence of preparations for marriage.* Proof of preparations by the prosecutrix to marry the defendant, in a criminal prosecution for seduction, is inadmissible. *State v. Buxton*, 573.

## VENUE.

17. *Change of venue—local prejudice—sufficiency of showing.* The defendant, on the eleventh day after being indicted for murder in the first degree, moved for a change of venue on the ground of the prejudice of the people of the county, and supported his motion by affidavits showing that, after the alleged murder, lengthy and sensational comments were published in the local daily papers, in which the defendant was denounced as a slayer and a villain, and in which it was charged that he had seduced the deceased; that his father had been guilty of a like offense to that charged in the indictment, and had been tried therefor; that the defendant had committed burglary and robbery, and had been implicated in stealing a diamond ring from the finger of the decedent after her death; that he killed the decedent to conceal the fact that she was pregnant by him; that he had murdered a man in another state, and was then a fugitive from justice; and that he was engaged in enticing women away for the purposes of prostitution. The state filed the counter affidavits of ten citizens, stating that they had read the newspaper accounts, or some of them, in relation to the alleged murder, and had heard the matter talked of some among the residents of the county, and, from what they had heard and

CRIMINAL LAW. VENUE. *Continued.*

read, they were of the opinion that there was no prejudice against the defendant. *Held*, that while the motion was addressed to the sound discretion of the court, it was error to overrule it upon the showing made. *State v. Crafton*, 109.

See Venue.

## BASTARDY.

18. *Complaint—motion to quash—waiver of errors.* The rules applicable to ordinary actions prevail in bastardy proceedings. Accordingly, where the defendant in such a proceeding moved to quash the complaint, and the motion was overruled, he waived his right to object to such ruling by pleading not guilty, and going to trial on such plea. *State v. Johnson*, 1.

19. *Evidence—sexual relations with other men.* In a bastardy proceeding, evidence that the plaintiff had sexual intercourse with men other than the defendant, but not at the time the child was begotten, is immaterial to the main issue, and is not admissible for the purpose of impeaching the complainant, when no foundation has been laid. *Id.*

20. ——— *recalling witness—facts overlooked.* It is no abuse of the court's discretion to allow the state in such proceeding to recall a witness, after the defendant has rested, to prove facts which might have been established on his first examination, but which were then overlooked. *Id.*

21. *Question in issue—evidence to support verdict.* Where there is evidence to support a verdict of guilty in such proceeding, it can not be set aside upon evidence that the prosecutrix was a woman of loose habits, and that, upon the night when the child was begotten, she was in questionable relations with a man other than the defendant, but with whom, by her uncontradicted testimony, she did not have sexual intercourse. *Id.*

22. *Proof of paternity—conflict of evidence.* Where in an action for the support of a bastard child the fact of sexual intercourse was admitted by the defendant, and the evidence was conflicting upon the question whether the parties were together during the period when conception must have taken place, but the preponderance was in favor of the state, *held*, that a verdict against the defendant would not be disturbed, although it appeared that during the same period the complainant had intercourse with other men. *State v. Baker*, 133.

23. *Settlement—agreement by minor.* A settlement made by a minor female in full of all claims on account of sexual intercourse had with her can not be set up as a bar to an action by the state to recover support for a bastard child of its putative father. *Id.*

CRIMINAL LAW. *Continued.*

## BURGLARY.

24. *Circumstantial evidence.* The defendants were convicted of burglary in the nighttime, upon evidence which was wholly circumstantial, but which is considered in the opinion, and held to be sufficient to support the verdict. *State v. Gadbois, 25.*

25. *Complicity of defendants—evidence.* Where the state claimed that the defendants were concerned jointly in the burglary for which they were indicted, and they had denied that they had ever met before their arrest, the state was properly permitted to prove that they had been seen together in several different places in Iowa during a period of nearly two years before the burglary was committed. *Id.*

26. *Evidence—schedule time of trains.* Where, in a prosecution for burglary, it became material to show the times of the arrival and departure of trains at a certain time and place, *held*, that it was competent to show the schedule of time for the trains at the time and place in question, without showing that they actually arrived and departed on that time. *Id.*

27. ——— *order of introduction.* Where, in a prosecution for burglary, several witnesses for the state, while it was introducing its evidence in chief, testified to the whereabouts of the defendants on a certain morning, and afterward the defendants introduced evidence to show that they were in another county on the morning in question, *held*, that it was no abuse of the discretion of the court to allow the state to call other witnesses, after the defendants had rested, to testify that the defendants were in the place stated by its first witnesses at the time referred to. *Id.*

## FORGERY.

28. *Degrees of offense—altering written instrument.* The altering of a written instrument, so as to make it a different instrument, is the making of a new instrument, under section 3917 of the Code, defining the highest degree of forgery, and not the obliteration of an instrument, under section 3929, defining a lower degree of forgery. *State v. Kidd, 54.*

29. *Intent to defraud—instructions to jury.* Upon the trial of an indictment for forgery in altering the special findings of the jury in a civil action, the defendant asked an instruction based upon the theory that there was no evidence of the existence of any person, partnership or corporation capable of being defrauded by the changes, but the evidence showed, beyond question, that the defendant was the plaintiff in the civil action, and that the alterations were intended to defraud the defendant in that action, and that that action had been begun and prosecuted to judgment against the defendant therein as a corporation. *Held*, that the defendant herein was estopped to question the corporate capacity of the opposite party in that action, and that the instruction was properly refused. *Id.*

CRIMINAL LAW. *Continued.*

## MURDER.

30. *Manslaughter by minor—capacity to commit crime—instruction to jury.* The defendant was found guilty of manslaughter upon evidence which showed that, when he was only thirteen years of age, he willfully, but without anger or malice, threw a playmate, a boy ten years of age, into the water, so that he was drowned. The court, on its own motion, gave the following instruction: "In determining the guilt or innocence of the defendant, you may consider his age, and all facts and circumstances which are in evidence or arise from the evidence." No other instructions were asked or given. *Held*, that the verdict could not be set aside on appeal on the ground that the instruction given was insufficient to present to the jury the question whether or not the defendant, at his age, possessed sufficient capacity to render him criminally liable for the homicide. *State v. Milholland, 5.*

31. *Homicide—self-defense.* The killing of an assailant is excusable, on the ground of self-defense, only when it is, or reasonably appears to be, the only means of saving one's own life, or preventing great bodily injury. If the danger, which appears to be imminent, can be avoided in any other way, as by retiring from the conflict, the taking of the life of the assailant is not excusable. *State v. Jones, 182.*

32. *Evidence of simultaneous assault upon another.* The defendant was indicted for the murder of a girl ten years of age, whose body was found with that of her mother, who had also been murdered, lying upon a bed at their residence, the mother's underclothing bearing evidence of an assault. *Held*, that the state was entitled to show in connection with the situation of the body of the child, the condition of the body of the mother when found, and of the clothing upon it, in order that the connection of the defendant with the crime of which he was accused, the circumstances under which it was committed, and the motives which prompted it, might be more fully understood. *State v. Dooley, 584.*

33. *Evidence—res gestæ.* On a trial for murder, the testimony of a policeman, who arrived at the scene of the homicide after it had been committed, as to what an eyewitness thereof said about it in the presence of the defendant, was admissible for the state, there being no evidence that the defendant was not in a condition to hear or did not hear, what was said. *State v. Crafton, 109.*

34. ——— *conduct of defendant.* In such a case, evidence that prior to the killing, the defendant slapped the decedent on the ear, and looked cross, was admissible to show the relations of the parties and their feelings toward each other. *Id.*

35. ——— *conduct and relation of parties.* Evidence that, some days before the murder, the defendant introduced the deceased to the witness as his wife, and rented a room for their use, under a false

CRIMINAL LAW. MURDER. *Continued.*

name, and that the witness saw the deceased in bed with another man, and that the defendant was disrobed in the same room, was material to show the relations of the parties. *Id.*

See paragraph 43.

## SEDUCTION.

36. *Proof—conflict of evidence—effect.* Where in a prosecution for seduction it was shown by the testimony of several witnesses that the parties were not together on the day named by the prosecutrix as the time of the commission of the act, but the evidence did not indicate that it must have been on said day or not at all, nor that if not on such day the testimony of the prosecutrix was entirely unworthy of credit, *held*, that there was not such a failure of evidence as would warrant the court in setting aside a verdict against the defendant. *State v. McIntyre, 139.*

37. *Persuasive arts—instructions to jury.* It appearing from the evidence that the defendant hugged and kissed the prosecutrix, told her that there would be no harm in the act, that other girls had yielded to him without the promise of marriage, and that he would marry her whether or not anything happened to her, and the prosecutrix having testified that it was because of this, and the defendant's promise to marry her, that she submitted to him, *held*, that the evidence warranted an instruction to the jury that they should find the defendant guilty if they found that he induced her to yield to him by a promise of marriage "or by the use of other seductive arts." *Id.*

38. *Chastity of prosecuting witness—evidence.* The fact that the prosecuting witness in such case allowed her male friends when escorting her home on the first occasion to hug and kiss her is not conclusive evidence of unchastity. *Id.*

39. *Chastity of prosecutrix—reformation—instructions to jury.* Where in a prosecution for seduction there was evidence of the previous unchaste character of the prosecutrix, and no evidence of reformation, *held*, that an instruction to the jury that, if they believed the evidence of the unchastity of the prosecutrix, then she was unchaste at the time of the alleged seduction, "unless she had reformed," was erroneous. *State v. Buxton, 573.*

## UNLAWFUL ASSEMBLY.

40. *Injury to building—construction of statute.* Where persons assembled primarily for the purpose of driving away or frightening certain employees at a railway station, but, while so assembled, threw coal around the waiting room, and against the walls, forced open the door of the private office, and broke the lock thereof, *held*, that they were guilty of riotously assembling together to injure a building, within the meaning of section 4070 of the Code. *State v. Johnson et al., 594.*

CRIMINAL LAW. *Continued.*

## FINES.

41. *Libel—amount of fine.* A fine of five hundred dollars in a case of criminal libel, *held*, not excessive where it appeared that the libel was grossly offensive, and that its publication was without any provocation that could be justly urged in mitigation of the punishment imposed. *State v. Belvel, 405.*

## PUNISHMENT FIXED BY VERDICT.

42. *Change on appeal.* The defendant was only sixteen years old at the time of the murder and previous to that time had been a quiet, well behaved boy, favorably regarded by those who knew him, and there was no evidence, except the crimes in question, that he was of a depraved nature, though inferior in average development to other boys of his age. *Held*, that the punishment of death, as fixed by the verdict of the jury, being authorized by the evidence, the above facts as to the character of the defendant were not sufficient to warrant the interference of the supreme court in changing the punishment to be inflicted. *State v. Dooley, 584.*

## PARDONS.

43. *Murder—instructions to jury.* Upon the trial of an indictment for murder in the first degree the accused is not entitled to have the jury instructed in regard to the law of pardons applicable to persons convicted of such offense. *Id.*

## EXTRADITION.

44. *Trial for different offense.* Where a person is indicted for a certain offense in this state, and he is brought for trial thereon from another state upon the requisition of the governor, and in the meantime he is indicted in this state for another offense, he may be tried upon the last indictment, without first giving him a reasonable opportunity to return to the state from which he was brought. *State v. Healy, 94.*

CUSTOM. See Negligence, 13.

## DAMAGES.

## RIGHT TO RECOVER.

1. *Sale—warranty—breach.* A contract of warranty on the sale of a stallion provided that if the stallion was not a reasonably sure foal getter the vendee could return him, in as good condition as he was then in, and the vendor would exchange him for another stallion, giving or receiving the actual difference in the value of the two animals. The horse having died before the result of his services could be known, *held*, that the return of the horse in the event of a breach of the warranty was optional with the vendee, and that his failure to return him would not defeat the vendee's right to recover damages for a breach of the warranty. *Love & Co. v. Ross et al., 400.*

DAMAGES. *Continued.*

## WHAT MAY BE RECOVERED.

2. *Negligent killing of man seventy-one years old—verdict.* A verdict of six hundred dollars for the negligent killing of a man seventy-one years of age, whom the evidence shows to have been of such industrious and economical habits that he might have earned more than a living in the management of his eighty acre farm, is not excessive. *Moore v. Keokuk & W. R'y Co.*, 223.

3. *Exemplary damages—attachment—malice—evidence.* Evidence, in an action aided by attachment, that the plaintiff knew that some of the grounds alleged for the issuance of the writ were false, and that the plaintiff had no reason to believe that any of them were true, is sufficient to support a verdict for exemplary damages. *Wright v. Waddell*, 350.

4. ——— *personal injury—horse frightened by dog—pleading.* In an action for damages for injuries sustained by reason of the plaintiff's horse being attacked by the defendant's dog on the public highway, whereby the horse was frightened and ran away, and the plaintiff was thrown upon a barbed wire fence, and injured, *held*, that an allegation in the petition that the defendants were the owners of the dog, and harbored and kept him "willfully, unlawfully and maliciously," with full knowledge of his vicious habits and practices, and made no effort to restrain him, nor to protect the public from his vicious attacks, was sufficient to support a recovery of exemplary damages, if established by the evidence. Whether proof of notice to the owner of the vicious character of the dog before the injury occurred is necessary to a recovery of actual damages in such case, *quære*. *Cameron v. Bryan*, 214.

5. ——— *reputation of dog—evidence.* Evidence of the general reputation of the dog in such case, as being vicious and dangerous, is competent as tending to raise an inference that the owner had knowledge of his vicious propensities. *Id.*

6. *Permanent scar and disfigurement of face.* A verdict of fifteen hundred dollars in such case as damages for a lacerated wound on the side of the face and neck of a girl about eighteen years of age, causing a permanent scar and disfigurement of the face, and much pain and suffering, both mental and physical, and necessitating medical attendance to the value of seventy-five dollars, besides nursing and the usual care and attention, is not excessive. *Id.*

7. *Personal injury to brakeman—verdict.* A verdict of five thousand dollars for the negligent killing of a brakeman on a freight train, who at the time was twenty-five years of age, in good health, and earning fifty-five dollars a month, all of which sum was consumed in the support of himself and family, is not excessive. *Lowe v. C., St. P., M. & O. R'y Co.*, 420.

**DAMAGES. Continued.****MEASURE OF.**

8. *Sale—warranty—breach.* For the breach of an express warranty in the sale of a horse, the measure of damages is the difference between the actual value of the horse at the time of the sale, and what he would have been worth if he had been as represented or warranted, as shown by the evidence. *Douglass & Hemingway v. Moses*, 40.

9. ————. The measure of a vendee's damages for breach of warranty in the sale of a stallion is the difference between the value of the horse as he was, and as he was warranted to be, and the expense incurred by reason of his not being as warranted. The difference in the amount realized in the services of the horse, and what would have been realized had the horse been as warranted is not recoverable. *Love & Co. v. Ross et al.*, 400.

10. *Sale of hogs at auction—false representations.* In an action to recover on account of the breach of a warranty of the soundness of hogs purchased at public auction, and for false representations as to their health and soundness, made at the time of the sale by the owner, the latter knowing them to be diseased with cholera, the plaintiff is entitled to recover, not only for the loss of the hogs, and for care and attention to them, but also for the loss of other hogs to which the disease was communicated by those purchased. *Stevens v. Bradley & Son*, 174.

11. *Injury causing death.* The measure of damages recoverable for negligence causing death, is the pecuniary loss to the estate of the deceased, caused by his death, in view of his age, occupation, the wages he was receiving, his condition of health, and his ability, if any, to earn money. The recovery is not limited to such sum as, placed at legal interest for the time of the deceased's expectancy of life, would produce the amount he would have accumulated over and above his liabilities at his death, had he lived out his expectancy of life. *Lowe v. C., St. P. M. & O. R'y Co.*, 420.

**WAIVER.**

12. *Sale—delivery of goods of inferior quality—acceptance by vendee—damages.* Where upon a sale of lumber, the kind delivered to the vendee was of an inferior quality and of different dimension from that agreed to be furnished, but the same was accepted by the vendee with knowledge of the defects, and without complaint until about four months after delivery, and after a part of the price had been paid, held, that the vendee was not entitled to recover the actual damages sustained by reason of the difference in the kind and quality of the lumber furnished. *Berthold & Jennings v. Mfg. Co.*, 596.

**DISTRICT COURT RULES.** See Practice and Procedure, 1.

## DIVORCE.

## GROUNDS.

*Adultery—evidence.* In an action for divorce on the grounds of adultery, proof that the defendant visited houses of prostitution, that on one occasion he retired to a room with one of the inmates of such a house, and that at one time, during the absence of his wife from home, two prostitutes were brought to his house, and remained all night is sufficient to support a decree for the plaintiff. *Abel v. Abel*, 300.

DOWER. See Estates of Decedents, 4, 5.

## EASEMENT.

## RIGHTS OF PURCHASERS.

*Change of recorded agreement by parol—purchaser with actual notice.* One M., in his lifetime, conveyed to the plaintiff a right of way over certain land, which right, however, was to terminate upon the breach, by the plaintiff, of certain conditions named in the conveyance, which was duly recorded. Afterward, by parol agreement between M. and the plaintiff, these conditions were modified, and the plaintiff continued to enjoy the right of way under the modified conditions. Afterward M. died, and his executor conveyed the land in question to the defendant, the deed containing a reservation of the right of way. Moreover, the defendant, long before and at the time of his purchase, knew that the plaintiff was enjoying the right of way, with the acquiescence of M., without observing the conditions contained in the recorded agreement. *Held*, that the defendant was charged with actual notice of the oral agreement under which the plaintiff was enjoying the right of way, and that he purchased subject thereto, and could not be heard to say that the right of way was terminated on account of the plaintiff's failure to observe the conditions named in the recorded agreement. *Peterson v. Pearson*, 104.

ELECTION. See Estates of Decedents, 5; Remedy.

## EMINENT DOMAIN.

## CONSTRUCTION OF STATUTE.

*Construction of waterworks—necessity for taking property.* Section 474 of the Code granting power to cities to condemn so much private property as may be "necessary for the construction and operation" of waterworks, does not authorize the taking of private property on which to lay a railroad track for the purpose of conveying the materials used in the construction of said waterworks, and the coal used in their operation, from the railroad station in a town to a point a mile and three quarters distant, where the waterworks are to be constructed; at least where it appears that a public road, much used for

**EMINENT DOMAIN. CONSTRUCTION OF STATUTE. Continued.**

travel, though somewhat hilly, and at times impassable on account of mud, leads from the railroad station to said waterworks. Neither can such power be exercised, however necessary, to enable a waterworks company to ship ice cut on its reservoir. *Creston Waterworks Co. v. McGrath, 502.*

**EQUITY.****FRAUD.**

1. *Conveyance of real estate—agency—relief.* The plaintiff, in consideration of certain land scrip, agreed with W. to convey certain lands to such person as W. might designate. Thereupon W. negotiated a sale of the land to the defendant, to whom the land was conveyed by the plaintiff. The scrip received from W. having been found to be worthless, the plaintiff brought this action to cancel the deed to the defendant on the ground of fraud. *Held*, that, as W. was not the agent of the defendant, and the latter had no knowledge of the fraud practiced by W., the plaintiff was not entitled to the relief asked. *Belau v. Bryan, 348.*

**CREDITOR'S BILL.**

2. *Sale—deed—right to possession—priority of liens.* Where a judgment has been enforced, by supplemental proceedings, against the equitable interest of the judgment debtor in real estate, and a deed acquired, the grantee thereunder will be entitled to the possession of said property as against the owner of a senior judgment, under which supplemental proceedings were commenced before those by said grantee, but never prosecuted to a final decree. And, while the title under said sheriff's deed will be subject to the lien of the latter judgment, it is absolute as against a judgment senior to that under which said deed was acquired, but under which supplemental proceedings were commenced subsequent to those by said grantee, or, if prior in point of time, were dismissed without a hearing, thus divesting such judgment of the lien thereby acquired. *Boggs v. Douglas, 150.*

**INJUNCTION.**

3. *Jurisdiction—adequate remedy at law—injunction to enjoin condemnation proceedings.* A court of equity will not entertain an action to enjoin proceedings to condemn land for railway purposes for the reason that the proceedings are unauthorized, because the land is already devoted to public use, and it would be unlawful to condemn it, as such objection is available as a defense in the condemnation proceeding, and the party asserting it is thus afforded an adequate remedy at law. Whether an injunction will lie where the property holder would sustain an injury before the right to condemn could be determined in the condemnation proceeding, *quære.* *Waterloo Water Co. v. Hoxie, 317.*

See Intoxicating Liquors.

EQUITY. *Continued.*

QUIETING TITLE. See Former Adjudication, 1.

## REFORMATION OF DECREE.

4. *Attachment—lien—equitable interest in real estate—supplemental proceedings—erroneous description—effect.* Where the levy of an attachment upon real estate, previously conveyed by the attachment debtor in fraud of creditors, was followed by supplemental proceedings for the enforcement of the attachment lien, in which the petition by mistake described the property as in township seventy-three, instead of township seventy-two, the correct description, and this error was carried into the decree in such proceeding, which was intended to set aside said conveyance for fraud, and a sale was had thereunder to satisfy the judgment in the attachment proceeding, *held*, that the purchaser at said sale acquired no title to said property, nor any right to redeem from an execution sale thereof under a senior judgment, and that he was not entitled to have the error in said decree corrected in a court of equity, and the sale thereunder made effective as against a judgment creditor of said fraudulent grantor, who had redeemed from the sale under said senior judgment by payment of the necessary amount into court. *Boggs v. Douglas, 150.*

SPECIFIC PERFORMANCE. See Contracts, 8; Sales, 3, 4.

## ESTATES OF DECEDENTS.

## ASSETS.

1. *Life insurance—policy—construction—death of beneficiary—interest of heirs.* A policy of life insurance was, by its terms, payable to a beneficiary named therein, or to her "legal representatives," upon the death of the insured; or, if the beneficiary was not then living, to her children, or to their guardian. The only child of the beneficiary died, leaving two children; and thereafter, but before the death of the insured, the beneficiary died. *Held*, that upon the death of the insured, the insurance did not become a part of the assets of the estate of the beneficiary, but passed to the grandchildren by the law of decent. *In re Estate of Conrad, 396.*

2. *Administrator's bond—security required only for actual value of property.* Where an administrator gives a bond in a penal sum exceeding the value of property coming into his hands, the clerk of the district court will not be liable for his approval of sureties who were insufficient for the amount of such bond, if they were at the time sufficient for a bond of the amount required by law, according to the real value of the property received by the administrator. *Marshall Field & Co. v. Wallace, 597.*

ESTATES OF DECEDENTS. *Continued.*

## CONVERSION BY EXECUTOR.

3. *Payment of bequests—loss chargeable pro rata to shares of beneficiaries—lien upon real estate.* A testator having two sons and a daughter, devised all of his real estate to his sons, and bequeathed a sum of money to his daughter, the will providing that, if the personal estate proved insufficient to pay the bequest, the sons should make good the deficiency. The division of the property was such as to indicate an intention on the part of the testator to divide his estate equally among his three children. The executor qualified with S., one of the sons, as surety on his bond, and thereafter converted all of the proceeds of the personal estate in his hands to his own use; but the whole of said personal estate was insufficient to pay the bequest to the daughter. *Held*, that the effect of the will was to create a lien upon the real estate devised to the sons for the amount of the deficiency in the personal estate for the payment of the bequest to the daughter; that the loss to the estate on account of the conversion of the executor was chargeable to the estate, and should be borne *pro rata* by the beneficiaries under the will; and that the share of said loss which was chargeable to S. was, by virtue of his legal obligation under the provisions of his will, a lien upon the real estate devised to S., regardless of his obligation upon the bond of the executor. *Henry v. Griffs*, 543.

## RIGHTS OF SURVIVING HUSBAND AND WIFE.

4. *Dower—homestead—election.* The primary interest of a widow in her husband's estate is her distributive share, and an election is necessary only when she desires to take the homestead in lieu of dower; but there may be an express election to take the distributive share, and any act indicating such election will negative an intention to take the homestead, though continuing to occupy it for a number of years. *Wilcox v. Wilcox*, 388.

5. *Homestead—widow's election after mortgage of distributive share.* Where, five years after the death of her husband, and while continuing to occupy the homestead, a widow executed a mortgage upon her undivided one third interest in her husband's estate, and afterward executed another mortgage upon the same and the undivided interest of one of the heirs, which she, with another heir, had acquired by conveyance, and thereafter the widow filed a petition to have such distributive share set apart to her, and a decree was entered according to her prayer, but was subsequently set aside on the petition of one of the heirs, *held*, that she could not thereafter make her election to take the homestead, and thus defeat the lien of said mortgages. *Id.*

6. *Election of widow to take homestead.* Where a homestead was occupied by a widow and her minor children for nearly six years after the death of her husband, *held*, that the presumption, arising from such occupancy, of an election to take the homestead for life in lieu

ESTATES OF DECEDENTS. RIGHTS OF SURVIVING HUSBAND AND WIFE.  
*Continued.*

of her distributive share, was not overcome by evidence that she, at one time, commenced proceedings to have her distributive share set off to her, but which she afterward abandoned, and determined to occupy the homestead in lieu of such share; that she and a husband by a subsequent marriage gave a quitclaim deed to the land as security, and at the same time executed a mortgage upon the unassigned dower interest of the wife, and that the latter, about a hour before she died, but when very feeble, promised one to whom she had become indebted a mortgage upon the land. *Zwick v. Johns, 550.*

DESCENT.

7. *Homestead—abandonment—rights of heirs.* After her occupancy of the homestead for nearly six years, the wife being in ill health and unable to attend to the duties of the farm, she and her husband by a subsequent marriage, sold their household goods, leased the farm for two years, with the intention of returning at the end of that time and again occupy, the homestead, and went to another state, where the wife died in less than a year, and none of the family returned to again occupy the homestead. *Held*, that the homestead was not abandoned, and that the title thereto descended to the wife's children. *Id.*

BOND OF DEVISEE.

8. *Allowance of claims—proceedings to set aside—security for payment—estoppel.* Where upon application by an administrator to sell real estate for the payment of a claim against the estate, duly allowed and approved, the sole devisee and legatee of said estate filed an answer thereto alleging that the allowance of said claim was procured by collusion and fraud, and asking that she be allowed to defend, and offering to file a good and sufficient bond for the payment of all claims established against said estate by the court, and a continuance of the hearing on said application was granted said devisee upon her filing a bond as offered, and thereafter upon proper proceedings instituted to vacate the order allowing said claim on the grounds of fraud and collusion, and the invalidity thereof, it was determined by the court that said allowance should stand, and the petition to vacate was denied, *held*, that the devisee was estopped from denying her liability for the payment of said claim. *Snelling v. Krogar, 247.*

ESTOPPEL.

IN PAIS.

1. *Possession of personal property by agent—innocent purchaser.* Although the possession and control of personal property be given to an agent, who is engaged in the business of buying and selling property of like character, yet the agent in fact have no authority to sell, the principal will not be estopped from claiming his property as against

**ESTOPPEL. IN PAIS. Continued.**

an innocent purchaser without notice, to whom the property was sold without authority, and without the knowledge of the principal. *Gilman Linseed Oil Co. v. Norton & Worthington*, 434.

2. ————. The fact that the plaintiffs, after receiving information of the sale to the defendants, attempted to procure a settlement with L. & Co. for the value of the seed sold, and made no demand of the defendants therefor until after the commencement of this action, *held*, not to estop them from asserting their claim against the defendants for the value of the property. *Id.*

3. *Silence during action of another.* Although the defendant had once moved his building to a location that he supposed was wholly upon his own lot, *held*, that the plaintiff was not thereby estopped from claiming that such building rested partly upon his lot. *Neary v. Jones*, 556.

**BY RECORD.**

4. *Action against corporation—corporate capacity questioned by plaintiff in subsequent criminal proceeding.* Upon the trial of an indictment for forgery in altering the special findings of the jury in a civil action, the defendant asked an instruction based upon the theory that there was no evidence of the existence of any person, partnership or corporation capable of being defrauded by the changes, but the evidence showed, beyond question, that the defendant was the plaintiff in the civil action, and that the alterations were intended to defraud the defendant in that action, and that that action had been begun and prosecuted to judgment against the defendant therein as a corporation. *Held*, that the defendant herein was estopped to question the corporate capacity of the opposite party in that action, and that the instruction was properly refused. *State v. Kidd*, 54.

**EVIDENCE.****MATERIALITY.**

1. *Bastardy—sexual relations with other men.* In a bastardy proceeding, evidence that the defendant had sexual intercourse with men other than the defendant, but not at the time the child was begotten, is immaterial to the main issue, and is not admissible for the purpose of impeaching the complaint, when no foundation has been laid. *State v. Johnson*, 1.

2. *Sale—rescission for fraud.* In an action to rescind a sale and recover the goods, on the alleged ground that the purchasers procured them by false representations as to their financial condition, and not upon the ground that they fraudulently concealed from the agent, who make the sale, knowledge of their actual condition, *held*, that a question to such agent, as a witness, as to what effect it would have had upon the sale if the purchasers had told him of their indebtedness, was properly ruled out as being immaterial to the issue. *Franklin Sugar Ref. Co. v. Collier et al.*, 69.

EVIDENCE. MATERIALITY. *Continued.*

3. *Belief—conclusions.* Where in an action to recover for the support of a child, the jury were instructed that the father of the child was under legal obligation to support it, *held*, that evidence as to what the father's expectations were in regard to supporting the child was immaterial. *Dutton v. SeEVERS*, 302.

## RELEVANCY.

4. *Burglary—schedule time of trains.* Where, in a prosecution for burglary, it became material to show the times of the arrival and departure of trains at a certain time and place, *held*, that it was competent to show the schedule of time for the trains at the time and place in question, without showing that they actually arrived and departed on that time. *State v. Gadbois*, 25.

5. *Secondary—when admissible.* Where a certain chattel mortgage, which was in the defendant's possession, was material as evidence for the plaintiff, and the defendant and his counsel had been served with notice to produce it on the trial, which they failed to do, and, in response to the question of the court, what answer he had to make to the notice, defendant's counsel replied, "Not any," *held*, that there was no error in admitting the official record of the mortgage, when offered by the plaintiff. *State v. Chase*, 38.

6. *Opinion—leading questions.* On the trial of an indictment for forgery in altering certain special findings in a civil action, in which the defendant herein was plaintiff, the clerk of the court having testified that he kept the findings behind a pile of blanks in a particular case, was asked: "Could anyone see them there, on looking at the case, without reaching around behind the blanks?" *held*, that the question called for a fact, and not for an opinion, and that it was not objectionable as leading. *State v. Kidd*, 54.

7. *Murder—res gesta.* On a trial for murder, the testimony of a policeman, who arrived at the scene of the homicide after it had been committed, as to what an eyewitness thereof said about it in the presence of the defendant, was admissible for the state, there being no evidence that the defendant was not in a condition to hear, or did not hear, what was said. *State v. Crafton*, 109.

8. ———— *conduct and relations of parties.* In such case, evidence that, some days before the murder, the defendant introduced the deceased to the witness as his wife, and rented a room for their use, under a false name, and that the witness saw the deceased in bed with another man, and that the defendant was disrobed in the same room, was material to show the relations of the parties. *Id.*

9. ———— *conduct of defendant.* In such a case, evidence that, prior to the killing, the defendant slapped the decedent on the ear, and looked cross, was admissible to show the relations of the parties and their feelings toward each other. *Id.*

EVIDENCE. RELEVANCY. *Continued.*

10. *Railroads—injury to stock—declarations of agents.* In an action to recover for the negligent killing of a colt by a railroad company, the admission in evidence of statement made by the defendant's section boss and station agent in regard to the colt, which were not part of the *res gestæ*, nor shown to be authorized by the employment of the persons who made them, is erroneous. *Wall v. Des M. & N. W. Ry Co.*, 193.

11. *Personal injury—horse frightened by dog—reputation of dog.* In an action for damages sustained through the frightening of a horse by a dog, evidence of the general reputation of the dog as being vicious and dangerous, is competent as tending to raise an inference that the owner had knowledge of his vicious propensities. *Cameron v. Bryan*, 214.

12. ——— evidence of previous habits—pleading—variance. It being alleged in the petition that the dog was in the habit of attacking, biting, chasing and frightening teams, *held*, that evidence that the dog was habitually frightening teams by chasing, barking, biting, or in any other way, was admissible, although the traits proven were not just the same as those averred in the petition; and the right of the plaintiff to recover in such case is not affected by the fact that the evidence fails to show that the dog has before committed the same act of which the plaintiff complains. *Id.*

13. *Judgment in another action.* In an action to recover for the support of a minor child. The plaintiff's petition alleged that a divorce had been obtained by the child's mother from the defendant, and the latter in his answer admitted the divorce, and set up the provisions of the decree as a defense. In his reply the plaintiff denied the decedent's knowledge of the terms of the decree. The court having instructed the jury that the decree would not bar the plaintiff's right to recover, but that it might be considered in determining the question whether the deceased expected compensation for the services rendered, *held*, that the admission of the decree in evidence, and of testimony tending to show that the deceased had actual knowledge of its provisions, was not erroneous. *Dutton v. SeEVERS*, 302.

14. *Negligence—location of accident.* In an action to recover for a personal injury to a brakeman upon a railroad, it is proper to locate the place of the injury by the testimony of the brakeman that the coupling was made "in the yards of the defendant." *Horan v. C., St. P., M. & O. Ry Co.*, 328.

15. *Conclusions.* The testimony of the brakeman in such case that the cause of his hand getting caught was "by the defect being in the road, and slipping off the tie," is not objectionable as the statement of a conclusion. *Id.*

EVIDENCE. RELEVANCY. *Continued.*

16. *Description of position occupied by witness.* In such case it was proper to permit the brakeman to describe to the jury the position he would have occupied if he had used the stick in making the coupling. *Id.*

17. *Master and servant—undisclosed intention of employer.* Evidence of the intention of the conductor of the freight train, in such a case, as to whether the deceased should uncouple the car in question, and what he proposed to have done in relation to such car, uncommunicated to the deceased, is not admissible. *Lowe v. C., St. P., M. & O. Ry Co., 420.*

18. *Approval of bonds—evidence of care.* In an action against the clerk of the district court for negligently approving an insufficient administrator's bond, evidence of inquiries, made by the clerk, of business men in the community and of information received, before approving the bond, as to the extent and value of the estate of the deceased, and of the financial standing of the firm of which he was a member when he died, is admissible for the purpose of showing the degree of care and diligence exercised. *Marshall Field & Co. v. Wallace, 597.*

19. *Bond of administrator—approval—liability of clerk.* But evidence of the manner in which the administrator and his sureties lived subsequent to the approval of the bond is not relevant. *Id.*

20. *Contracts—rebuttal.* Where in an action to recover the cost of one half of a party wall, the defendant pleaded an oral agreement on the part of the plaintiff to permit the defendant to use said wall without charge, and offered evidence thereof on the trial, *held*, that proof offered by the plaintiff in rebuttal, of a written agreement to arbitrate the question of the proportion of the cost of said wall that should be paid by either party, made after the alleged oral agreement, and signed by both parties, was erroneously excluded. *Marcus v. Dohany, 658.*

## COMPETENCY.

21. *Testimony by attorney.* Where on the trial of an indictment for forgery in altering certain special findings in a civil action, it had been shown that the findings had been in the office of the defendant's attorney for a time, and that the defendant was there a part of that time, and had the findings in his hands one or more times, *held*, that a question to his attorney as to whether, during that time, he had been in the habit of watching what the defendant did, was neither incompetent nor immaterial. *State v. Kidd, 54.*

22. ——— *Error without prejudice.* The defendant's attorney having testified that the defendant was in full view the second time he was in his office, he was asked: "Did he make those erasures, or any of them, during that time—the second time?" *held*, that the

EVIDENCE. COMPETENCY. *Continued.*

question called for a fact and not an opinion, and that it was error to sustain an objection to it, made by the state, on the ground of incompetency and immateriality; but that the error was without prejudice to the defendant, as the witness was afterward permitted to state all that the question called for. *Id.*

23. *Privileged communications—attorney and client.* Upon the trial of an indictment for forgery in altering the special findings in a civil action, it appeared that the defendant had sent to his attorney in a civil case a copy of the findings for a proper purpose: that he afterward wrote to such attorney, requesting him to return the copy to him, to be shown to another person named; that the copy was returned accordingly, and that it was afterward sent back to the attorney, altered to correspond with the alterations in the original; and the attorney was required to testify to these matters, and to produce the documents, against his protest and the objection of the defendant that they were privileged communications. *Held*, that there being nothing in the defendant's letter of a confidential nature, it was not a privileged communication; that the special findings were part of the public records, and that, therefore, a true copy of them was not a privileged communication; and that, while the altered copy might be regarded as a confidential communication, it was not privileged, since the evident intent thereof was to deceive, not only the attorney, but the court also, and the rule is that professional communications are not privileged, when they are for an unlawful purpose, having for their object the commission of a crime. *Id.*

24. *Opinions.* Questions as to a witness' physical, mental and nervous condition at the time of a stated business transaction are not objectionable as calling for an opinion. *O'Brien v. C., M. & St. P. R'y Co.*, 644.

25. *Testimony of experts—instruction to jury.* There having been introduced the testimony of two veterinary surgeons, as experts, one of whom had had sixteen years of practice, and the other less than one, *held*, that a general instruction to the jury that, this kind of evidence is competent and should be given such weight as in their judgment it was entitled to receive, was not objectionable as taking from the jury the right to determine the weight to be given such evidence. *Powell v. Chittick*, 513.

26. *Transactions with party deceased—form of objection.* In an action brought by a banking company upon a promissory note to which, it was alleged, the defendant's name had been signed, under his direction and authority, by his wife, since deceased, *held*, that a witness who was the owner of said bank, transacted all the business touching the execution of said note, and who is interested in the result of said action was not competent to testify as to the circumstances that led to the making of said note, why the maker wanted

EVIDENCE. COMPETENCY. *Continued.*

the money, when it would be paid, and the source from which it was expected to procure money for payment. Whether an objection to such evidence as "incompetent and immaterial" is sufficient to raise the question of the right of the witness to testify as to personal transactions with one deceased, *quære*. *Campbell Banking Co. v. Cole*, 211.

27. *Ante mortem declarations—conclusions.* In an action by an administrator to recover for the support of a minor child maintained by his decedent, *held*, that evidence as to the expectations of the decedent as to the matter of compensation, and his belief and conclusions in relation to the same, was inadmissible. *Dutton v. SeEVERS*, 302.

## PROOF.

28. *Contracts in writing—subsequent change by parol agreement.* Where, in an action upon a written contract of subscription of stock, the plaintiff alleged, that said agreement was subsequently changed by writing thereon the word "donation," *held*, that the admission of parol evidence to show the agreement of the parties, whereby said subscription was changed to a donation, was not in violation of the rule excluding parol evidence to vary or contradict a written contract. *Lake Manawa Ry Co. v. Squire*, 576.

29. *Evidence of contemporaneous parol agreement.* Evidence that at the time such an order was delivered to an agent of the vendor it was orally agreed that the order should be sent to his principal for approval and acceptance, is not incompetent as tending to contradict a written contract. *Machine Co. v. Richardson*, 525.

30. *Railroad ticket—mutilation of contract—testimony of agent—evidence.* At the time of the plaintiff's ejection from the train in 1891 he held a ticket purchased in 1890, which he claimed was, according to its terms, good for passage until 1899, but at the time of its production in evidence on the trial it was impossible to determine, from inspection, the date to which it run, because of its mutilated condition. *Held*, that the ticket agent, of whom the ticket in question was purchased, should have been permitted to testify as to the limit he was permitted to sell tickets on at the time of the purchase. *Dooley v. B., C. R. & N. Ry Co.*, 450.

## BURDEN OF PROOF.

31. *Attachment—intervention—pleading.* A petition of intervention in an action by attachment, wherein certain personal property had been seized, alleged that at the date of the levy, and at the time of filing of said petition, the intervenor was the owner of the property, and that he acquired such ownership by purchase from time to time of the attachment defendant, and the same were in his possession at the time of the levy of the attachment. The attachment plaintiff, for answer to said petition of intervention, denied that the intervenor was on the day when he filed his petition the owner of the property,

EVIDENCE. BURDEN OF PROOF. *Continued.*

or entitled to its possession. *Held*, that the burden was upon the intervenor to prove that he was the owner of the property at the date of filing his petition. *Lagomarcino v. Quattrochi*, 197.

32. *License—buildings erected on lands of another.* No right being reserved in said original deed to erect buildings on the conveyed premises for use in connection with the mining thereof, *held*, that the burden was upon the defendant to show that the privilege to erect houses on said lands was necessary to the right to work the mine, and that, in the absence of such evidence, the title to a permanent dwelling on said premises, voluntarily erected by the defendant, should be quieted in the plaintiff. *Bonson v. Jones*, 380.

## PROOF OF PARTICULAR ISSUES.

33. *Liquor nuisance—injunction.* Evidence that persons in the habit of drinking intoxicating liquors frequented the defendant's premises, that people were seen there intoxicated, that the place had the reputation of being a saloon, and that its general appearance, and the odor therefrom, indicated to passers-by that intoxicating liquors were sold there, *held*, sufficient to support a finding that the defendant was engaged in the illegal sale of intoxicating liquors, although there was no direct evidence that the defendant sold intoxicating liquor, and the defendant testified that the liquor drank upon the premises was brought there by others. *Nichols v. Thomas*, 394.

34. *Injury to brakeman—contributory negligence.* The conductor of the train, on which the plaintiff's intestate was employed as brakeman, had received a telegram before reaching the station where the accident in question occurred, to set out the car uncoupled by the deceased, and, after reading the same, said to the brakeman, "we will set out that head stock car." It was not the special duty of any particular member of the train crew to place cars on the side track, but upon the arrival of the train at the station the conductor and two of the brakemen proceeded to unload freight, and the deceased, without special orders, proceeded with the engineer to set out the car in question, that car with five others being uncoupled from the train for that purpose. After the switch had been thrown, and the signal given to back, but while the cars were moving slowly, the deceased went between the cars to uncouple the stock car. He might have uncoupled the car before he threw the switch, or after they had passed upon the side track, and in either case the cars would not have been moving, but that was not the usual way of doing, and would have required more time; and, under the rules of the company, there was but nine minutes' time, after the arrival of the train at the station, in which to unload freight, set out the stock car on the side track, return with the engine to the main track, and side track the train, so as to leave the main track clear for the passenger train. *Held*, that the

EVIDENCE. PROOF OF PARTICULAR ISSUES. *Continued.*

finding of the jury, that the deceased was not guilty of negligence contributing to his injuries was supported by the evidence. *Lowe v. C., St. P., M. & O. Ry Co.*, 420.

35. *Title to real estate—resulting trust.* Where, upon an attachment of real estate as the property of the husband, the wife intervened, claiming that the property was purchased by her husband as her agent, and with her money, and that his conveyance of the same to her after the attachment, was in pursuance of an agreement made by him when she first discovered that the property had been taken in his name, and the wife's testimony was confirmed by that of the husband, but it appeared that some of the tax receipts were issued to the husband, that several witnesses had heard of the husband and wife speak of the property belonging to the former, that the husband contracted for the property about ten months before his marriage, made a lease of the property and received the rent, and executed a mortgage, on a portion thereof, on which the wife joined to release her right of dower; that some of the statements of the wife, on the trial, were contradictory, and that she admitted having testified in a case tried in Kansas that she did not know that she owned any property in this state, *held*, that the wife's claim of title was not supported by the evidence. *McIntosh v. Lee*, 488.

36. *Murder—sufficiency of evidence to support verdict.* The defendant resided on a farm with his uncle, who, on the day of the murder, had left home early in the morning, leaving his wife and daughter, a girl of ten years, and the defendant on the farm. From a confession made by the defendant to the reporter of a newspaper, it appeared that, after his uncle's departure, the defendant was scolded by his aunt for allowing the cattle to get into a neighbor's field, at which he became angry, and went to town and purchased a revolver. At the dinner table his aunt again scolded him for neglecting the cattle, and they quarreled for some minutes. After dinner, his aunt having begun again to scold him, the defendant took a padlock from his pocket, which he had picked up in the yard, struck his aunt twice with it on the head, knocking her down, and then shot her. Afterward the little girl, for the murder of whom the defendant was indicted, came running in from the barn, and, as she passed through the door the defendant struck her on the head with the padlock, knocked her down, and then shot her in the forehead. Having placed the bodies on the bed, the defendant took a satchel, with clothing, locked the house, harnessed a team to a buggy, and drove away. The defendant claimed that he purchased the revolver to practice with, and at the time had no intention of shooting any one, and that he had not felt any improper desires towards his aunt nor his cousin. The confession contained many statements shown to be false, and it was uncertain how much of it was true, but the defendant admitted the unlawful killing of his cousin upon the trial, and,

**EVIDENCE. PROOF OF PARTICULAR ISSUES. *Continued.***

taking the confession with other evidence in the case, the jury were warranted in finding the facts substantially as above stated. *Held*, that a verdict of murder in the first degree was supported by the evidence.

**ERROR WITHOUT PREJUDICE.**

37. *Leading questions.* The allowance of leading questions and the admission, in evidence, of the conclusions of a witness are not grounds for the reversal of a cause, where it appears that in the subsequent course of the trial every fact and circumstance connected with the subject of the witness' testimony were given in detail. *Mucci v. Houghton*, 608.

38. *Error cured by instructions to jury.* The admission of immaterial evidence will be deemed without prejudice where, under the instructions of the court, such evidence is excluded from the consideration of the jury. *Miller v. Ill. Cent. R'y Co.*, 567.

39. *Error cured by instruction to jury.* When testimony, erroneously admitted is taken from the jury by a proper instruction, the error is cured, and is no ground for a reversal. *State v. Crafton*, 109.

40. *Facts admitted.* Where in an action to recover for the support of a child, the defendant admitted in his answer that he was able to maintain the child, *held*, that the exclusion of evidence as to the defendant's financial ability was without prejudice. *Dutton v. Seavers*, 302.

41. *Testimony not responsive.* The admission of testimony which is not responsive to questions asked a witness will not be deemed prejudicial when the facts testified to are relevant and have been previously given in evidence in answer to proper questions. *Horan v. C., St. P., M. & O. R'y Co.*, 323.

42. *Testimony of experts—practice.* Where it was sought to introduce the testimony of experts before proof of the facts upon which such testimony was based, though such proof was afterward made, *held*, that the exclusion was without prejudice where it appeared that the expert was afterward called, and testified as such upon every question involved in the case. *Mucci v. Houghton*, 608.

**EXECUTION.****EXEMPTIONS.**

1. *Personal earnings of artist—value of materials used.* The personal earnings of an artist for painting pictures are exempt from execution under section 3074 of the Code. A judgment of the district court holding such earnings exempt will not be disturbed upon appeal because the amount thereby secured to the debtor includes a nominal sum for the cost of materials. *Millington v. Laurer*, 322.

EXECUTION. EXEMPTIONS. *Continued.*

2. *Assignment—rights of assignees.* Under an assignment of the personal earnings of a debtor, made within ninety days from the time the services were rendered, the rights of the debtor under the statute, exempting such claim from execution or attachment, passes to the assignee, although the latter be a nonresident of the state. *Id.*

3. ——— *right of set-off.* Such a claim is not subject in the hands of the assignee to a set-off for the amount of a judgment existing against the assignor at the time the assignment was made. *Id.*

## SALE.

4. *Deed—right to possession—priority of liens.* Where a judgment has been enforced, by supplemental proceedings, against the equitable interest of the judgment debtor in real estate, and a deed acquired, the grantee thereunder will be entitled to the possession of said property as against the owner of a senior judgment, under which supplemental proceedings were commenced before those by said grantee, but never prosecuted to a final decree. And while the title under said sheriff's deed will be subject to the lien of the latter judgment, it is absolute as against a judgment senior to that under which said deed was acquired, but under which supplemental proceedings were commenced subsequent to those by said grantee, or, if prior in point of time, were dismissed without a hearing, thus divesting such judgment of the lien thereby acquired. *Boggs v. Douglas, 150.*

## REDEMPTION.

5. *Full payment required.* The payment to the clerk of the court of a sum less than the amount paid by the holder of a sheriff's certificate, with interest and costs, will not be effectual as a redemption, by the owner of premises, from a sale thereof under execution. *Id.*

6. *Attachment—lien—equitable interest in real estate—supplemental proceedings—erroneous description—effect.* Where the levy of an attachment upon real estate, previously conveyed by the attachment debtor in fraud of creditors, was followed by supplemental proceedings for the enforcement of the attachment lien, in which the petition by mistake described the property as in township seventy-three, instead of township seventy-two, the correct description, and this error was carried into the decree in such proceeding, which was intended to set aside said conveyance for fraud, and a sale was had thereunder to satisfy the judgment in the attachment proceeding, *held*, that the purchaser at said sale acquired no title to said property, nor any right to redeem from an execution sale thereof under a senior judgment, and that he was not entitled to have the error in said decree corrected in a court of equity, and the sale thereunder made effective as against a judgment creditor of said fraudulent grantor, who had redeemed from the sale under said senior judgment by payment of the necessary amount into court. *Id.*

EXTRADITION. See Criminal Law, 44.

FENCES.

IN PARTITION.

*Kind of fence—agreement construed.* Where the owners and occupants of adjoining farms agreed to erect and maintain each a certain part of a division fence, and one of them kept hogs and the other did not, and, without any agreement as to the kind of fence to be maintained, they each built and for sixteen years maintained a hog-tight rail fence, *held*, that no obligation arose therefrom to maintain a hog-tight fence, but it was the right of the one who did not keep hogs, when his part of the fence required renewing, to replace it, without previous agreement, but with notice to the other party, with a fence which was not hog-tight, provided it was a lawful fence, as prescribed by statute, and that for depredations committed by the hogs of the other party, which came upon his land through such lawful fence, he was entitled to recover. *Panther v. Trauman*, 101.

FORGERY. See Criminal Law, 28, 29.

FORMER ADJUDICATION.

AS TO WHAT MATTERS CONCLUSIVE.

1. *Action for possession of real estate—statute of limitations.* A decree quieting the title to land in the plaintiff, in an action brought to obtain such relief, and forever barring and estopping the defendant therein from thereafter claiming title thereto, but containing no provision as to the possession of the property, will estop such defendant from setting up the statute of limitations against said plaintiff in an action subsequently commenced by the latter for the possession of said property. *Hintrager v. Smith*, 270.

2. *Questions not in issue—special verdict—estoppel.* Where, in an action against R., S. and others as copartners, the jury found specially that a partnership existed between all of the defendants, save S., but that he was liable to creditors because of having allowed his name to be used as a member of the firm, *held*, that the fact of the partnership not being in issue in such action, and judgment having been rendered therein against all of the defendants, without fixing the order of their liability, R. was not estopped thereby from subsequently maintaining an action against S. for contribution on account of the debts of said partnership. *Runnel v. Smith*, 636.

3. *Application of rule to second appeal.* This action was originally begun to enjoin the railroad commissioners from establishing and promulgating joint rates for the plaintiff, in connection with other railroad companies, for the shipment of cars over such roads, on the ground that the statutes authorizing the commissioners to establish and promulgate such joint rates were in conflict with various provisions of the constitution of the United States and that of the state of

FORMER ADJUDICATION. AS TO WHAT MATTERS CONCLUSIVE. *Continued.*

Iowa. Upon a motion to dissolve the temporary injunction issued in the case, the legal effect of which was the same as a demurrer to the petition, the constitutionality of the statutes involved was fully considered and affirmed on a former appeal to this court. The cause having been remanded, the plaintiff amended its petition by averring that, since the former hearing, the commissioners *had* fixed such joint rates, ordered that they take effect on a certain day, and that such order was without authority of law, and in excess of the powers of the commission, and that the statutes authorizing it were void, "and in conflict with various provisions of the constitution of the United States and that of the state of Iowa, for the reasons heretofore fully set forth," and each and all of the reasons so referred to were found in the petition passed upon on the first appeal. *Held*, upon appeal from an order sustaining a demurrer to the petition as thus amended, that the demurrer raised no question not raised and decided on the former appeal, and, particularly, that it did not raise any question as to the reasonableness of the rates fixed by the commissioners, and that, therefore, the questions raised could not be reconsidered, the rule being well settled in this state that when a question involved in a cause has once been adjudicated in this court, it becomes the law of that case, as between the parties, and will not be reconsidered upon a subsequent appeal of the same cause. *B., C. R. & N. E'y Co. v. Dey, 13.*

FRAUD.

INTENTION.

*Sale—rescission for fraud—evidence.* The fact that an insolvent orders goods on credit is not fraudulent, unless coupled with an intent not to pay for them, or unless the natural and probable, if not necessary, result of his act is to defraud the seller. And in this action to rescind a sale of sugar, and to recover the goods, upon the ground of fraudulent representations, where the evidence showed that the buyers were much in debt at the time, but failed to show that they were insolvent, or that the purchase was made with any fraudulent intent, or by means of fraudulent representations, except the statement that they were now through with their canning business and would thereafter have plenty of money, and discount their bills promptly, *held*, that the court properly directed a verdict for the defendant. *Franklin Sugar Ref. Co. v. Collier et al., 69.*

EVIDENCE. See Sales, 2.

FRAUDULENT CONVEYANCES.

WHAT CONSTITUTES.

1. *Withholding chattel mortgage from record—fraud.* The mere failure to file a chattel mortgage for record will not render such

FRAUDULENT CONVEYANCES. WHAT CONSTITUTES. *Continued.*

mortgage fraudulent as against subsequent creditors, in the absence of any agreement or understanding between the mortgagor and mortgagee that the same should be so withheld for the purpose of enabling the mortgagor to obtain further credit. *Mull & Sons v. Dooley*, 312.

2. *Intent to prevent seizure under execution—consideration.* A transfer of personal property in consideration of the assumption by the grantee of a mortgage thereon, and of the satisfaction of an indebtedness due said grantee from the grantor, but with the mutual purpose to prevent the seizure and sale of said property under execution on a judgment held by another creditor against the grantor, is not invalid in the absence of any intent to defraud. *Goodnow v. Friatt*, 601.

## GARNISHMENT.

## LIABILITY OF GARNISHEE.

1. *Upon default.* Where a garnishee pays no attention to the process served upon him, and obstinately places himself in a situation where he may suffer loss, he can not for such reason escape liability in the garnishment proceeding. *Citizens' State Bank v. Fuel Co.*, 618.

2. *May exceed liability to defendant.* Where a garnishee holds property of the defendant under a fraudulent conveyance, the extent of his liability is not measured by the rights of the defendant against the garnishee. *Id.*

3. *Fraudulent conveyance—possession as agent—surrender of property to principal.* The jury having found specially that the garnishee knew when he took possession of the property in question under the mortgage, and when he sold it, that the mortgage was executed and accepted with intent to hinder, delay or defraud creditors, held, that he could not escape liability by paying the proceeds of the property over to one of the parties to the fraudulent transaction on the claim that he acted as her agent only. *Id.*

## PRIORITY OF LIENS.

4. *Mortgage on income and profits of mine.* A mortgage upon the "income, issues and profits" of a coal mine includes accounts due the mine owner for coal sold from such mine, and is valid as against a garnishment of such accounts by a judgment creditor of the proprietor of the mine. *Funk v. Mercantile Trust Co.*, 264.

5. ——— *foreclosure—merger.* The priority of the lien of such mortgage would not be lost as to such accounts by the foreclosure of the mortgage, where the decree is made as broad as the mortgage and authorized the mortgagee to subject to the payment thereof the income and issues of the business of the mortgagor. *Id.*

6. *Landlord's lien—sale of property under agreement.* Where property subject to a landlord's lien and also to chattel mortgages, held by

GARNISHMENT. PRIORITY OF LIENS. *Continued.*

the landlord, was sold at public auction under an agreement between the landlord and his lessee that the proceeds of such sale should be received by the landlord, and applied to the payment of the rent due and of the mortgage indebtedness, *held*, that the right of the landlord to money due for property purchased at such sale was superior to that of a judgment creditor of the lessee under a garnishment of a purchaser subsequent to said agreement. *Bergman v. Guthrie*, 290.

## HIGHWAYS.

## PROCEEDINGS TO ESTABLISH.

1. *Establishment—appeal from decision of board of supervisors—notice—substituted service.* Under section 959 of the Code, providing that, in appeals to the district court from the decision of the board of supervisors establishing a highway, "notice shall be served on the four persons first named in the petition for the highway," personal service is required; and where notice of appeal was personally served upon three of such persons, and the fourth not being found, a copy of the notice was left at his usual place of residence with a member of his family over fourteen years of age, *held*, that the appeal was properly dismissed, although the person so served learned of the notice, and appeared in court for the purpose of objecting to the sufficiency of the service. *Ellis v. Carpenter*, 521.

2. ——— *right to withdraw appeal.* The plaintiff's appeal having been dismissed, *held*, that the defendants, who had also appealed from the decision of the board, were properly permitted to withdraw their appeal. *Id.*

## USE OF.

3. *Turning to left in violation of statute—collision—negligence.* Although section 1000 of the code provides that persons meeting each other on public highways shall give one half of the same by turning to the right, and that persons violating such provision shall be liable for all damages resulting therefrom, and shall also be liable to a fine, upon the prosecution of the person wronged, yet the fact that one who is traveling on horseback, in the nighttime, turns to the left, when he hears another approaching with a vehicle, is not conclusive evidence of negligence on his part, so as to preclude a recovery for his horse, when killed by a collision with the vehicle. *Riepe v. Elting*, 82.

4. *Turning to left—collision—negligence—evidence to support verdict.* The plaintiff's two sons were riding the plaintiff's horses toward the west, upon a public highway, in the nighttime, when they heard the defendant approaching them rapidly from the west with a vehicle, but could not see him on account of the darkness. There was a space of about ten feet between the traveled part of the road and the fence on the north, and one of the boys, who was riding a light bay horse, turned to the right into this space, while the other boy, who was riding

**HIGHWAYS. USE OF. Continued.**

a black horse, turned to the left, so that he was about ten feet south of the traveled track when his horse was struck and killed by the shaft of the defendant's vehicle, the defendant having turned to his own right when meeting the boys. In an action by the plaintiff to recover the value of the horse, *held*, that, in view of all the circumstances, the court properly submitted to the jury the question of the defendant's negligence, and that of the contributory negligence of the boy who rode the horse, and that a verdict for the plaintiff would not be set aside on appeal, as being unsupported by the evidence. *ROTHROCK and GRANGER, JJ., dissenting. Id.*

See Criminal Law, 2, 3.

**HOMESTEAD.****RIGHTS OF HUSBAND AND WIFE.**

1. *Property purchased by husband taken in wife's name—trusts—evidence.* Where, upon a sale of a homestead, purchased by a husband with his own money, the wife refused to join in the conveyance thereof unless the deed for property to be purchased with the proceeds of said sale was made to her, and the husband consented to have the deed so made, upon being advised that if the property was to be occupied as a homestead neither he nor his wife could alone dispose of, or incumber the same, and thereafter the wife procured a divorce from her husband, and occupied the property thus conveyed to her with a second husband and her children, *held*, that the evidence was insufficient to establish a trust as to said property for the benefit of the husband and his children. *Rogers v. McFarland, 286.*

See Estates of Decedents, 4, 5; Mortgages of Real Estate, 4.

**ABANDONMENT.**

2. *Removal from state with intention to return—evidence.* Where the owner of a homestead left it to go to a distant state for the benefit of his health, and to visit his children, taking with him only his ordinary wearing apparel, and leaving his household goods upon the premises, with the intention of returning thereto, and during his absence frequently expressed himself as intending to return, but after about three years he voted at an election in the state to which he had gone, and about a year thereafter he directed his household goods to be sold at public auction, *held*, that the premises retained their homestead character, at least until the time that the owner voted in the state to which he had gone. *Benbow v. Bower, 494*

3. *Removal from state with intention to return.* After her occupancy of the homestead for nearly six years, the wife, being in ill health, and unable to attend to the duties of the farm, she and her husband by the subsequent marriage, sold their household goods, leased the farm for two years, with the intention of returning at the end of that time and again occupying the homestead, and went to another state,

HOMESTEAD. ABANDONMENT. *Continued.*

where the wife died in less than a year, and none of the family returned to again occupy the homestead. *Held*, that the homestead was not abandoned, and that the title thereto descended to the wife's children. *Zwick v. Johns*, 550.

4. ——— *execution sale—estoppel.* The fact that the defendant purchased the premises at execution sale upon the faith of said lease of the land, and the removal of the family to another state, and in ignorance of any claim of a homestead right therein, *held*, not to operate as an estoppel against the plaintiff's claim, as guardian for the minor children of the wife, to have his title to said property quieted as against the defendant. *Id.*

## LIENS.

5. *Judgment—lien—duration—sale pending suspension of lien.* By the expiration of ten years a judgment, held by the defendants against the owner of a homestead, ceased to be a lien while said premises still retained their homestead character, and such lien was not revived by levy until after the homestead right became forfeited, and the property had been sold by the owner. *Held*, that the grantee was entitled to hold the property free from the lien of the judgment. *Bonbow v. Bower*, 494.

INDICTMENT. See Criminal Law.

INJUNCTION. See Equity; Intoxicating Liquors.

## INSTRUCTIONS TO JURY.

## REFUSAL TO INSTRUCT.

1. *When properly refused—objections too late.* Alleged error in giving an instruction can not be considered in this court, where no objection was made to it when given, and the giving of it has not been assigned as error. And it is not error to refuse instructions asked, when, so far as they are correct and applicable, they are substantially embraced in the charge given. *Riepe v. Elting*, 82.

2. *Substance embodied in court's charge.* The refusal of the district court, upon request, to give instructions to the jury embodying correct propositions of law, and applicable to the case, is not erroneous where such instructions are substantially embodied in the charge of the court. *State v. McIntyre*, 149.

3. *Trial upon indictment for murder—law as to pardons.* Upon the trial of an indictment for murder in the first degree the accused is not entitled to have the jury instructed in regard to the law of pardons applicable to persons convicted of such offense. *State v. Dooley*, 584.

## CONSTRUED.

4. *Whole charge to be considered.* Where, in a criminal prosecution, the intent to defraud was an essential element of the crime charged, and the court so instructed the jury in one paragraph of the

INSTRUCTIONS TO JURY. CONSTRUED. *Continued.*

charge, it was not error to omit this element of the crime in subsequent paragraphs, when the whole charge, taken together, clearly and correctly defined the crime. *State v. Chase, 38.*

5. *Manslaughter by minor—capacity to commit crime.* The defendant was found guilty of manslaughter upon evidence which showed that, when he was only thirteen years of age, he willfully, but without anger or malice, threw a playmate, a boy ten years of age, into the water, so that he was drowned. The court, on its own motion, gave the following instruction: "In determining the guilt or innocence of the defendant, you may consider his age, and all facts and circumstances which are in evidence or arise from the evidence." No other instructions were asked or given. *Held*, that the verdict could not be set aside on appeal on the ground that the instruction given was insufficient to present to the jury the question whether or not the defendant, at his age, possessed sufficient capacity to render him criminally liable for the homicide. *State v. Milholland, 5.*

6. *Sale of horse—action on express warranty.* In an action upon an express warranty in the sale of a horse, an instruction that "if no representations were made at the time of sale, but the plaintiffs looked him (the horse) over, and took him upon their own judgment, without asking anything about the horse, then they can not recover in this action, and your verdict will be for the defendant," is approved. *Douglass & Hemingway v. Moses, 40.*

7. *Elements of negligence—contradictory instructions.* In an action to recover for a personal injury, after the court had, in one instruction, taken from the jury certain elements of negligence as charged in the petition, it was error, in other instructions, to tell the jury that the plaintiff could recover if she showed that the death of her intestate was the result of one or more of the acts of negligence charged in the petition. *Banning v. C., R. I. & P. Ry Co., 74.*

8. *Instruction without evidence—comparative negligence.* An instruction intended to cover a case where the defendant is negligent after being aware of the negligence of the injured party, was erroneous, because there was no evidence on which to base it, and because it was so worded as to lead the jury into an inquiry as to the comparative negligence of the defendant and the deceased; the doctrine of comparative negligence not being recognized in this state. *Id.*

9. *Witnesses—credibility.* The district court being asked to instruct the jury that if they found that any witness in the case had knowingly sworn falsely in relation to any material matter or statement, then they might disregard the entire evidence of such witness, gave such instruction with the addition, "But you are not bound to do so if you still believe it worthy of credit." *Held*, that the additional words did not change the legal effect of the instruction asked. *State v. Baker, 133.*

INSTRUCTIONS TO JURY. CONSTRUED. *Continued.*

10. *Questions not in dispute.* The facts alleged in the petition as constituting negligence being admitted by the defendant in its answer, and the only issue being whether the colt in question was in fact killed by the defendant, *held*, that the submission to the jury of the question whether the defendant was negligent in the operation of its trains was erroneous. *Wall v. Des M. & N. W. Ry Co.*, 193.

11. *Testimony of experts.* There having been introduced the testimony of two veterinary surgeons, as experts, one of whom had had sixteen years of practice, and the other less than one, *held*, that a general instruction to the jury that, this kind of evidence is competent and should be given such weight as in their judgment it was entitled to receive, was not objectionable as taking from the jury the right to determine the weight to be given such evidence. *Powell v. Chittick*, 513.

12. *Warranty—breach—evidence.* Where in an action for damages for a breach of the warranty implied by law in the sale of a threshing machine, the defendant's answer was a general denial of the allegations of the petition, except as to the fact of the sale, and the evidence showed an express warranty in writing by the vendor relating to the same subject and obligations as would be included in the implied warranty, but conditioned upon notice being given the vendor of any defects within one week after the machine was put in operation, *held*, that an instruction withdrawing said express warranty from the consideration of the jury was erroneous, and was prejudicial to the defendant. *Bucy v. Pitts Agricultural Works*, 464.

13. *Criminal trial—reference to indictment.* An instruction in such case that before the defendant could be convicted "of the crime charged in the indictment" the state must prove certain facts specified beyond a reasonable doubt, is not objectionable as referring the jury to the indictment for information in regard to the offense charged. *State v. Dooley*, 584.

## INSURANCE (FIRE)

## PROOFS OF LOSS.

1. *Waiver—authority of agent.* Where an agent, specially employed by an insurance company to adjust one of two losses, resulting from the same fire, but under policies upon different property, having adjusted the loss with reference to which he was employed, made an agreement with the owner of the property that proofs of loss under the other policy need not be made, and that the claim should abide the result of an arbitration agreed upon with other companies having policies upon the same property, *held*, that, in the absence of knowledge by the insured of the limitation upon the agent's authority, the insurance company was bound by the agent's agreement waiving proofs of loss. *Slater v. Capital Ins. Co.*, 625.

INSURANCE (FIRE). PROOFS OF LOSS. *Continued.*

2. *Authority of agent—instructions to jury.* An instruction in such case that, the authority given the agent to settle one of said losses might be considered by the jury as a circumstance to show the relation existing between the insurance company and said agent, and in determining whether said agent was authorized to adjust and settle the other loss sustained by the plaintiff, was not erroneous. *Id.*

## ACTION ON POLICY.

3. *Representations of insured—evidence.* A policy of insurance against fire provided that if the building insured "stands on leased ground, or if the title be less than fee simple in the insured, it must be so represented to said company, and so expressed in the written portion of the policy; otherwise, said policy shall be void." The policy contained no representation whatever as to the title of the insured. *Held*, that, notwithstanding the provisions of section 2, chapter 211, of Acts of the Eighteenth General Assembly, that, unless a copy of the representations of the insured, which are made a part of the contract of insurance, is attached to such policy, or indorsed thereon, the insurer shall be precluded from pleading or proving such representations, or any part thereof, or the falsity thereof, in an action upon such policy, evidence that the insured property stood upon leased ground is admissible on behalf of the insurer to show a concealment of the extent of the title of the insured, and to defeat a recovery upon the policy under the above provision. *Mackinnon & Co. v. Mut. Fire Ins. Co.*, 170.

## INSURANCE (LIFE).

## POLICY.

*Construction—death of beneficiary—interest of heirs.* A policy of life insurance was, by its terms, payable to a beneficiary named therein, or to her "legal representatives," upon the death of the insured; or, if the beneficiary was not then living, to her children, or to their children. The only child of the beneficiary died, leaving two children; and thereafter, but before the death of the insured, the beneficiary died. *Held*, that, upon the death of the insured, the insurance did not become a part of the assets of the estate of the beneficiary, but passed to the grandchildren by the law of descent. *In re Estate of Conrad*, 396.

## INTOXICATING LIQUORS.

## ILLEGAL SALE.

1. *Sales by druggist and physician—evidence of good faith.* On the trial of a druggist, who was also a physician, on a charge of selling intoxicating liquors contrary to law, the court instructed that the good faith of the defendant was a material fact in his defense, but sustained objections to questions asked the defendant, as a witness, whether sales to two certain persons were made by him as a physician

INTOXICATING LIQUORS. ILLEGAL SALE. *Continued.*

in good faith. *Held*, that this was error, but that it was without prejudice, in view of the fact that the defendant had several times emphatically testified that all sales made by him were made as a physician, in good faith. *State v. Field, 34.*

2. ——— *good faith—instruction to jury.* In such case, the court instructed the jury, that if it found that the liquor was sold and dispensed by the defendant in good faith, as a physician, to patients actually sick and under his treatment, to acquit. *Held*, that the instruction was in accord with section 2, chapter 35, of Acts of the Twenty-third General Assembly, and that to have so modified it as to justify sales to patients whom the defendant in good faith *believed* to be actually sick, would not have been warranted by the law. *Id.*

3. *Nuisance—injunction—extent of lien for costs.* Where, in an action to enjoin the sale of intoxicating liquors contrary to law upon certain premises, it appeared that the liquors were kept in a room in a cellar of the dwelling house occupied by the defendants, who were husband and wife, but no right of homestead was claimed, *held*, that a lien for the costs of such proceeding should have been decreed against the entire premises, and not simply against the room in which the liquors were kept. *Cameron v. Gminder, 298.*

4. ——— *evidence.* Evidence that persons in the habit of drinking intoxicating liquors frequented the defendant's premises, that people were seen there intoxicated, that the place had the reputation of being a saloon, and that its general appearance, and the odor therefrom, indicated to passers-by that intoxicating liquors were sold there, *held*, sufficient to support a finding that the defendant was engaged in the illegal sale of intoxicating liquors, although there was no direct evidence that the defendant sold intoxicating liquor, and the defendant testified that the liquor drank upon the premises was brought there by others. *Nichols v. Thomas, 394.*

## INJUNCTION.

5. *Violation by tenant—contempt.* A tenant can not be charged with contempt for the violation of an injunction of which he has no knowledge, restraining the owner of premises alone from the maintenance of a nuisance by the illegal sale of intoxicating liquors thereon. *Newcomer v. Tucker, 486.*

6. *Violation of injunction—contempt—action to make fine a lien on real estate—parties.* Where an action to enjoin a liquor nuisance was properly brought in the name of a citizen of the county, such citizen may maintain an action to make a fine, imposed for the violation of the injunction issued in the former action, a lien upon the real estate, where such nuisance was maintained with the consent of the owner. *Cameron v. Kapinos, 561.*

INTOXICATING LIQUORS. INJUNCTION. *Continued.*

7. ————. Under the provisions of section 12, chapter 66, of Acts of the Twenty-first General Assembly, making all fines and costs assessed, or judgments rendered, of any kind, against any person for any violation of an injunction against the use of premises for the unlawful sale of intoxicating liquors, a lien upon premises used for such purpose, with the knowledge of the owner thereof or his agent, *held*, that a fine imposed in a contempt proceeding for the violation of an injunction, together with the costs of such proceeding, were enforceable against premises used for such purpose by the agent of the owner, and with her knowledge, though she was not a party to the contempt proceeding. *Id.*

SEIZURE UNDER SEARCH WARRANT.

8. *Replevin.* Replevin will not lie to recover the possession of intoxicating liquors taken by a sheriff, and held by him, by virtue of a search warrant duly issued in pursuance of the police regulations of the state. *Brewing Co. v. Armstrong*, 673.

COLLECTION OF COSTS AND FINES. See paragraphs 3, 6.

JUDGMENTS.

COLLATERAL ATTACK.

1. *Jurisdiction—original notice—defective service.* A judgment is not subject to collateral attack because of the defective service of the original notice, where the judgment recites that the defendant had due and legal service of the pendency of the action. *Rotch v. Humboldt College*, 480.

2. *Filing petition—record.* Notwithstanding the provision of section 200 of the Code, that no pleading shall be considered filed until a memorandum of the date of filing has been entered on the appearance docket, a judgment rendered in a cause without such entry having been made is not void, and is not subject to collateral attack on such ground. *Id.*

3. *Collection—title to proceeds—evidence.* The defendant, as guarantor of certain bonds, with interest coupons attached, having prosecuted an action thereon to judgment in the name of the plaintiff herein, and collected the same, claimed that three of said coupons were never assigned to the plaintiff, and that so much of said judgment as represented the amount of such coupons belonged to him. *Held*, that the defendant's claim was not an attack upon the judgment, which could only be made in a direct proceeding in the same tribunal where the judgment was rendered, and that in an action to recover the amount of such coupons the defendant was entitled to show that he was the owner thereof. *Tate v. Congar*, 242.

JUDGMENTS. *Continued.*

## LIEN.

4. *Duration—sale pending suspension of lien.* By the expiration of ten years a judgment, held by the defendants against the owner of a homestead, ceased to be a lien while said premises still retained their homestead character, and such lien was not revived by levy until after the homestead right became forfeited, and the property had been sold by the owner. *Held*, that the grantee was entitled to hold the property free from the lien of the judgment. *Benbow v. Bowers*, 494.

See equity, 2.

## PRIORITY OF LIENS.

5. *Satisfaction—record—estoppel.* Where a judgment was permitted to appear satisfied of record, by a sale of real estate under execution, for nearly a year, when the sale and satisfaction were set aside, on the ground that the property sold was the homestead of the judgment debtor and the judgment reinstated by order of court, *held*, that a mortgage, which was junior to said judgment, and purchased after maturity, but before the satisfaction of said judgment was set aside, and without notice of said homestead rights of the judgment debtor, was entitled to priority over said judgment. *Head Bros. v. Newcomb*, 728.

6. ———— *mistake.* The priority of the lien of the mortgage in such case would not be affected by the fact that, prior to the purchase of the mortgage, an order of court had been entered setting aside the levy and sale under said judgment, if proceedings to reinstate said judgment were not commenced until after said purchase. *Id.*

## JURISDICTION.

## OF COURTS IN PARTICULAR CASES.

1. *Justices' courts—action involving title to real estate—pleading and practice.* Where in an action before a justice of the peace against a railroad company for damages to growing timber from a fire set out by the defendant, the plaintiff's petition alleged ownership of the land, *held*, that the question of the plaintiff's title to said real estate would not be raised by demurrer; and if raised by answer, the cause should be transferred to the district court for trial. Such an issue presents no ground for the dismissal of the case by the justice for want of jurisdiction. *Delzell v. B., C. E. & N. Ry Co.*, 208.

2. *Criminal law—deposit of money in lieu of appearance bond—forfeiture after change of venue—what county entitled to money—practice.* Where one charged with a crime was bound over to appear at the district court of the defendant county, and he deposited money with the clerk in lieu of a bond, and, after indictment and two trials, in

**JURISDICTION. OF COURTS IN PARTICULAR CASES. Continued.**

which the jury failed to agree, he took a change of venue to the plaintiff county, but the money was not transmitted with the papers to the plaintiff county, and he made default, *held*, that the district court of the plaintiff county alone had jurisdiction to declare the money forfeited, and that it should have declared it forfeited to the plaintiff county for the benefit of its school fund; but that said court, having jurisdiction of the subject-matter, and having erroneously ordered the clerk of the defendant county to pay the money to the treasurer of that county, the order was binding until set aside upon appeal, writ of error, *certiorari*, or other appropriate proceeding, and that, after a lapse of more than five years, the plaintiff county could not maintain an action against the defendant county for the recovery of the money. *Warren Co., v. Polk Co., 44.*

3. *Assignment for benefit of creditors exceptions to report of assignee.* A proceeding to determine the validity of objections to the report of an assignee for the benefit of creditors is one at law. *In re Assignment of Cadwell's Bank, 533.*

4. *Arbitration and award—construction of statute.* Section 3431 of the Code providing that the statutes relating to arbitration shall not affect "the control of the court over the parties, the arbitrators or their award; nor impair or affect any action upon an award," relates to the jurisdiction of the court over common law awards, and does not entitle a party who has secured an award upon a statutory arbitration, to abandon the statutory remedies for judgment thereon and sue upon it as a common law award. *Older v. Quinn, 445.*

**JURY.****QUALIFICATION.**

1. *Previously formed opinion will not disqualify.* The fact that a juror has formed an opinion as to the guilt or innocence of the accused does not necessarily disqualify him, under section 4405, subdivision 11, of the Code, even though some evidence would be required to remove it. The opinion that disqualifies is such an one "as would prevent him from rendering a true verdict upon the evidence submitted on the trial." *State v. Field, 34.*

**EXAMINATION.**

2. *Upon trial of indictment for murder—peremptory challenge.* In view of the provisions of section 2, of chapter 165, of Acts of the Seventeenth General Assembly, as amended by section 2, of chapter 2, of Acts of the Eighteenth General Assembly, requiring the jury upon the trial of an indictment for murder, if they find the defendant guilty of murder in the first degree, to designate in their verdict whether he shall be punished by death or imprisonment for life in the penitentiary, the state may properly be permitted, upon the impaneling of the jury, to inquire of the individual jurors, for the purpose of

JURY. EXAMINATION. *Continued.*

peremptory challenge, whether they have any conscientious scruples against the infliction of the death penalty. *State v. Dooley, 574.*

## MISCONDUCT.

3. *New trial—discretion of court.* Where in a criminal case a new trial was asked upon affidavits showing that two of the witnesses for the state, severally, and at different times, spoke to one of the jurors during the intermission of the court, and while the trial was pending, eulogizing the prosecuting witness, and condemning the defendant; and that the foreman of the jury, during such an intermission, stated to a friend that court had to adjourn to give the prosecuting witness a rest, as the attorneys had worried him outrageously; and that the foreman, when the jury retired to consider its verdict, was apparently very anxious to procure a verdict against the defendant; and the trial court refused a new trial upon the case made, *held*, that the supreme court would not interfere, there being no showing that the juror encouraged the remarks of the witness, or believed what they said, or that the prosecution was in any way responsible for the irregularities complained of, or that the defendant was prejudiced thereby. *State v. Allen, 49.*

JUSTICES OF PEACE. See Jurisdiction, 1.

## LANDLORD AND TENANT.

## LEASE.

1. *Written lease superseded by verbal lease—consideration.* Where a written lease of lands for a term of years was terminated by an oral agreement of the parties, whereby the lessee paid the rent in arrears, and agreed to vacate, but subsequently a verbal lease was agreed to upon new terms and conditions, and in pursuance thereof the lessee remained upon the land at the same rent, and the lessor in part made certain improvements agreed to be made, *held*, that the verbal lease was not a mere modification of the written lease, but a new contract, and that both parties having by their acts recognized the termination of the written lease, and attempted a performance of the verbal lease, it was immaterial whether there was a new consideration for the latter or not. *Evans v. McKanna, 362.*

## LANDLORD'S LIEN.

2. *Sale of lessee's property by agreement—garnishment—priority of liens.* Where property subject to a landlord's lien and also to chattel mortgages held by the landlord, was sold at public auction under an agreement between the landlord and his lessee that the proceeds of such sale should be received by the landlord, and applied to the payment of the rent due and of the mortgage indebtedness, *held*, that the right of the landlord to money due for property purchased at such sale was superior to that of a judgment creditor of the lessee under a garnishment of a purchaser subsequent to said agreement. *Bergman v. Guthrie, 290.*

**LIBEL.** See Criminal Law, 41.

**LIMITATION OF ACTIONS.**

**WHEN STATUTE BEGINS TO RUN.**

1. *Action to recover real estate—absolute deed intended as mortgage.* The statute of limitations against an action for the recovery of real estate held under an absolute deed, but intended as a mortgage, begins to run from the date of the last payment upon said mortgage by the mortgagor, and not from the date of the agreement under which said deed was acquired. *Byers v. Johnson, 278.*

**ADVERSE POSSESSION.**

2. *Use for ten years under reservation in deed.* Ten years of uninterrupted use and occupation of an alley under a conveyance, in which said alley was reserved as such to the grantors, but across which the grantee, during said period, maintained a fence, and upon which he paid the taxes and special assessments, is sufficient to constitute a title by adverse possession as against an adjoining lot owner, who has not claimed the right to use said alley for more than ten years. *Pitzmann v. Aspelmeier, 179.*

**MANDAMUS.**

**WHEN WRIT WILL LIE.**

*Public officers—acts without the scope of office.* Mandamus will not lie to compel the secretary of state to supply a copy of an alleged amendment to the state constitution, and certify the same to be a part of said constitution, notwithstanding the decision of the supreme court that such amendment was not legally adopted. *Harvey v. McFarland, 703.*

**MASTER AND SERVANT.**

**RULES DISREGARDED BY EMPLOYEE.** See Negligence, 19.

**MECHANIC'S LIEN.**

**PROPERTY LIABLE TO.**

1. *Owner not liable beyond contract price.* The claim of a sub contractor, for materials furnished in the construction of a building, will not be established as a lien upon the premises, when it appears that the payments made by the owner and the senior liens are equal to the amount of the contract price. *Wickham Bros. v. Monroe, 666.*

**NOTICE OF FILING.**

2. *Served upon owner's attorney.* An attorney intrusted by the owner of premises with the adjustment of claims of the contractor and subcontractors, is an agent, within the meaning of section 2134 of the Code, requiring notice of the filing of a mechanic's lien to be served upon "the owner, his agent or trustee." Service upon such agent is not impaired by the fact that the notice served is addressed to the owner by name. *Wickham Bros. v. Monroe, 666.*

## MORTGAGES OF PERSONAL PROPERTY.

## DELIVERY.

1. *Agreement to execute mortgage—property not specified.* A debtor having agreed to execute a chattel mortgage to a creditor, and have the same recorded, the latter requested a notary to draft the mortgage, and leave it with the mortgagor. The amount to be secured was given to the notary, but nothing was said as to what property the mortgage was to cover. Before the mortgage was executed the mortgagee left for his home in another part of the state, and the mortgage remained in the hands of the notary for about three months, when it was handed to the mortgagor, who delivered it to the mortgagee, and it was then recorded. *Held*, that there was no delivery of the mortgage until it was received by the mortgagee. *Mull & Sons v. Dooley*, 312.

## VALIDITY.

2. *Description of indebtedness indefinite—fraud.* An indefinite statement in a chattel mortgage, as to the amount of the indebtedness intended to be secured thereby, when the facts relating to the indebtedness are within the knowledge of the parties, is not in itself such evidence of intentional concealment as will render the mortgage fraudulent. *Magirl v. Magirl*, 342.

3. ———. A chattel mortgage conditioned that the mortgagor shall save and protect the mortgagee "from the payment of any and all debts which he has obligated himself to pay" on the mortgagor's account, "as surety in fact or otherwise" for said mortgagor, is not so indefinite in its description of the indebtedness as to render the mortgage void as to the creditors of the mortgagor. *Id.*

4. *As to third parties—defective acknowledgment—possession of mortgagee—notice.* A chattel mortgage which is defectively acknowledged, is not for that reason invalid as to third parties, where the mortgagee is in actual possession of the property. *Leggett & Myers Tobacco Co. v. Collier et al.*, 144.

5. *Withholding from record—fraud.* The mere failure to file a chattel mortgage for record will not render such mortgage fraudulent as against subsequent creditors, in the absence of any agreement or understanding between the mortgagor and mortgagee that the same should be so withheld for the purpose of enabling the mortgagor to obtain further credit. *Mull & Sons v. Dooley*, 312.

6. *Contested in garnishment proceeding.* The remedy provided by chapter 117 of Acts of the Twenty-First General Assembly, for contesting the amount due upon a chattel mortgage, is not exclusive, and a creditor who has garnished a chattel mortgage in possession may attack the validity of such mortgage in the garnishment proceeding. *Citizens' State Bank v. Fuel Co.*, 613.

See Sales, 2.

MORTGAGES OF PERSONAL PROPERTY. *Continued.*

## PRIORITY OF LIENS.

7. *Mortgage on income and profits of mine—garnishment.* A mortgage upon the "income, issues and profits" of a coal mine includes accounts due the mine owner for coal sold from such mine, and is valid as against a garnishment of such accounts by a judgment creditor of the proprietor of the mine. *Funk v. Mercantile Trust Co.*, 264.

8. ——— *foreclosure—merger.* The priority of the lien of such mortgage would not be lost as to such accounts by the foreclosure of the mortgage, where the decree is made as broad as the mortgage, and authorized the mortgagee to subject to the payment thereof the income and issues of the business of the mortgagor. *Id.*

## MORTGAGES OF REAL ESTATE.

## DEED CONSTRUED AS MORTGAGE.

1. *Sheriff's deed—money loaned for redemption—evidence.* A part of the sum necessary to redeem certain real estate from a sale under execution was advanced by the defendant under a parol agreement that he would redeem the premises for the benefit of the owner, and that, if the same were not redeemed at the end of a year from the date of the sale, he would take a sheriff's deed in his own name, and hold the property until such time as the owner should pay him all the money he had expended, and thereupon his interest therein should cease. The premises were worth double the amount necessary to redeem, and, after the defendant acquired a sheriff's deed, the owner continued in possession thereof for about five years, and until the day of her death, making leases therefor, paying taxes and insurance, and collecting a part of the rents. *Held*, that the evidence was sufficient to show that the sheriff's deed was taken by the defendant for the purpose of security only. *Byers v. Johnson*, 278.

2. ——— *statute of frauds—practice in supreme court.* The question whether such an agreement is within the statute of frauds, and, therefore, not enforceable, not having been raised in the district court, *held*, that it would not be considered by the supreme court. *Id.*

3. ——— *limitation of actions.* The statute of limitations against an action for the recovery of real estate held under an absolute deed, but intended as a mortgage, begins to run from the date of the last payment upon said mortgage by the mortgagor, and not from the date of the agreement under which said deed was acquired. *Id.*

4. ——— *wife's interest in homestead sufficient to support agreement.* The interest of a wife in a homestead, the legal title to which is in the husband, who has abandoned his wife, is such as will entitle her to protect the property in the manner above stated. *Id.*

MORTGAGES OF REAL ESTATE. *Continued.*

## HOMESTEAD RIGHTS.

5. *Estates of decedents—homestead—widow's election after mortgage of distributive share.* Where, five years after the death of her husband, and while continuing to occupy the homestead, a widow executed a mortgage upon her undivided one third interest in her husband's estate, and afterward executed another mortgage upon the same and the undivided interest of one of the heirs, which she, with another heir, had acquired by conveyance, and thereafter the widow filed a petition to have such distributive share set apart to her, and a decree was entered according to her prayer, but was subsequently set aside on the petition of one of the heirs, *held*, that she could not thereafter make her election to take the homestead, and thus defeat the lien of said mortgages. *Wilcox v. Wilcox*, 338.

## CANCELLATION.

6. *Payment by third party—subrogation.* Where a mortgage was executed by a husband and wife upon their homestead to secure their joint indebtedness, and upon its maturity the amount of the mortgage debt was advanced by a third party to the husband, under an agreement that he should purchase the note and mortgage for such third party, and have the same properly assigned to her as security for her loan, but the husband failed, through inadvertence, to procure the assignment of the papers, and upon payment to the mortgagee the note and mortgage were marked canceled, the signatures cut off, and satisfaction of the mortgage entered of record, and the husband, upon discovering his mistake, offered to execute a new mortgage to the party who advanced the money, but the wife refused to join him therein, *held*, that the party advancing the money was entitled in equity to have her claim established as a lien upon the mortgaged property, and to a decree foreclosing the same, with the same effect as if the mortgage had been assigned to her. *Houser v. Sharman*, 355.

PRIORITY LIENS. See Taxation and Tax Titles, 2.

## FORECLOSURE.

7. *Purchase of outstanding title by tenant in common—effect.* Where, upon the foreclosure of a mortgage against property held in common, the property is bid in at the foreclosure sale by one of the cotenants, he can not, upon acquiring a sheriff's deed under such sale, claim absolute title to said property to the exclusion of his cotenants, but will have his interest therein increased merely to the extent of the amount necessary for the cotenant to redeem his undivided share. *Moy v. Moy*, 511.

MURDER. See Criminal Law.

NEGLIGENCE.

EVIDENCE.

1. *Railroads—Injury to brakeman.* Although at the time of the accident the train was under the orders of the deceased, the evidence showed that the engineer, knowing that the deceased was between the cars, without orders, and without warning, gave the cars a "kick." *Held*, that the defendant's negligence was established. *Lowe v. C., St. P., M. & O. R'y Co.*, 420.

2. *Clerk of district court—approval of bonds—evidence of care.* In an action against the clerk of the district court for negligently approving an insufficient administrator's bond, evidence of inquiries, made by the clerk, of business men in the community and of information received, before approving the bond, as to the extent and value of the estate of the deceased, and of the financial standing of the firm of which he was a member when he died, is admissible for the purpose of showing the degree of care and diligence exercised. *Marshall Field & Co. v. Wallace*, 597.

3. *Highways—use of—turning to left—collision—evidence to support verdict.* The plaintiff's two sons were riding the plaintiff's horses toward the west, upon a public highway, in the nighttime, when they heard the defendant approaching them rapidly from the west with a vehicle, but could not see him on account of the darkness. There was a space of about ten feet between the traveled part of the road and the fence on the north, and one of the boys, who was riding a light bay horse, turned to the right into this space, while the other boy, who was riding a black horse, turned to the left, so that he was about ten feet south of the traveled track when his horse was struck and killed by the shaft of the defendant's vehicle, the defendant having turned to his own right when meeting the boys. In an action by the plaintiff to recover the value of the horse, *held*, that, in view of all the circumstances, the court properly submitted to the jury the question of the defendant's negligence, and that of the contributory negligence of the boy who rode the horse, and that a verdict for the plaintiff would not be set aside on appeal, as being unsupported by the evidence. *ROTHBOCK and GRANGER, JJ., dissenting. Biepe v. Elting*, 82.

4. ——— turning to left in violation of statute—collision. Although section 1000 of the Code provides that persons meeting each other on public highways shall give one half of the same by turning to the right, and that persons violating such provision shall be liable for all damages resulting therefrom, and shall also be liable to a fine, upon the prosecution of the person wronged, yet the fact that one who is traveling on horseback, in the night time, turns to the left, when he hears another approaching with a vehicle, is not conclusive evidence of negligence on his part, so as to preclude a recovery for his horse, when killed by a collision with the vehicle. *Id.*

See Instructions to Jury, 7.

NEGLIGENCE. *Continued.*

## COMPARATIVE NEGLIGENCE.

5. *Rule not recognized in this state—instruction without evidence.*

In an action to recover damages for a personal injury, an instruction intended to cover a case where the defendant is negligent after being aware of the negligence of the injured party, held erroneous, because there was no evidence on which to base it, and because it was so worded as to lead the jury into an inquiry as to the comparative negligence of the defendant and the deceased; the doctrine of comparative negligence not being recognized in this state. *Banning v. C., R. I. & P. R'y Co.*, 74.

## CONTRIBUTORY NEGLIGENCE.

6. *Railroads—injury to passengers riding on show car.* The plaintiff's intestate was an employee of a traveling theatrical company, and it was his duty, when the company was being transported from place to place, to ride in the show car, owned by the company, in order to care for the company's property carried therein. This show car, while being transported by the defendant, was placed next to the engine in one of its passenger trains, and the plaintiff's intestate, while riding therein, was killed by a collision of his train with another. In an action for damages the evidence showed that the deceased had been riding in a passenger coach, but, some time before the collision, went forward to the show car; that the show car was a strong, well built car, fitted up on purpose for the accommodation of the employees whose duty it was to remain there day and night, and care for the scenery and other property of the company, and it did not appear that the defendant's employees made any objection to the deceased riding in said car. *Held*, that it was not, as matter of law, contributory negligence for the deceased to ride in the show car, under the circumstances, but that the question as to his contributory negligence was properly submitted to the jury, and that a verdict for the plaintiff on that issue could not be disturbed on appeal. *Blake v. B., C. R. & N. E'y Co.*, 8.

7. *Personal injury—proximate cause.* A party can not recover for a personal injury sustained through the negligence of another, if his own negligence has contributed to the injury, although the injury might have been avoided, if the party causing the same had exercised ordinary care. *Postman v. City of Decorah*, 336.

8. *Railroads—injury at crossing—duty to listen for trains.* When one is about to cross a railroad track, and knows that there are obstacles which may prevent his seeing an approaching train, and there is nothing to prevent his stopping and listening, and his attention is in no way diverted by surrounding circumstances from listening, and it appears that, if he had listened, the injury which he received by a collision with a moving car would have been avoided, the failure to listen constitutes such negligence as will defeat a recovery for the injury. *Banning v. C., R. I. & P. R'y Co.*, 74.

NEGLIGENCE. CONTRIBUTORY NEGLIGENCE. *Continued.*

9. *In any degree will defeat recovery.* In such case, it was error to instruct that the plaintiff could not recover if the deceased, by his negligence, "substantially" or "materially" contributed to the injury; the true rule being that, if the injured party contributes in any way, or in any degree, directly to the injury, there can be no recovery. *Id.*

10. *Personal injury—rules of railroad company—waiver.* The plaintiff's intestate, a brakeman on defendant railroad, in the performance of his duty, stepped onto a railroad track between slowly moving freight cars, for the purpose of uncoupling them, when the engineer, without orders, gave the cars a "kick," and the plaintiff's intestate was thrown under the wheels and killed. A rule of the defendant declared that "getting in between cars in motion to uncouple them" was in violation of duty, and was strictly prohibited. *Held*, that evidence that it was the custom of brakemen on the defendant's road to go onto the track, and between cars, when in motion, for the purpose of coupling and uncoupling them, was properly admitted for the purpose of showing a waiver of the above rule by the defendant, as alleged by the plaintiff, and that such practice, being open and notorious, and having existed for some time, the defendant's officers would be presumed to have notice of it. *Lowe v. C., St. P., M. & O. R'y Co.*, 420.

11. *Master and servant—undisclosed intention of employer.* Evidence of the intention of the conductor of the freight train, in such a case, as to whether the deceased should uncouple the car in question, and what he proposed to have done in relation to such car, uncommunicated to the deceased, is not admissible. *Id.*

12. *Railroads—injury to brakeman—evidence.* The conductor of the train, on which the plaintiff's intestate was employed as brakeman, had received a telegram before reaching the station where the accident in question occurred, to set out the car uncoupled by the deceased, and, after reading the same, said to the brakemen, "we will set out that head stock car." It was not the special duty of any particular member of the train crew to place cars on the side track, but upon the arrival of the train at the station the conductor and two of the brakemen proceeded to unload freight, and the deceased, without special orders, proceeded with the engineer to set out the car in question; that car, with five others, being uncoupled from the train for that purpose. After the switch had been thrown, and the signal given to back, but while the cars were moving slowly, the deceased went between the cars to uncouple the stock car. He might have uncoupled the car before he threw the switch, or after they had passed upon the side track, and in either case the cars would not have been moving, but that was not the usual way of doing, and would have required more time; and, under the rules of the company, there was but nine minutes' time, after the arrival of the train at the station, in which to

NEGLIGENCE. CONTRIBUTORY NEGLIGENCE. *Continued.*

unload freight, set out the stock car on the side track, return with the engine to the main track, and side track the train, so as to leave the main track clear for the passenger train. *Held*, that the finding of the jury, that the deceased was not guilty of negligence contributing to his injuries was supported by the evidence. *Id.*

13. *Railroad—defective appliances—injury to employee—custom—evidence.* In an action by a brakeman to recover of a railroad company for injuries sustained through stepping upon a defective lid to the manhole of the water tank on the tender of an engine, while passing from the cab of the engine to the cars for the purpose of setting the brakes, as his duties required, *held*, that proof of the custom of brakemen, in going over the tender, to step on the lid of the manhole, might be shown by the testimony of witnesses as to what they would do under similar circumstances, and what was considered a safe course to pursue. *Miller v. Ill. Cent. R'y Co.*, 567.

14. ————. It is not competent, in such case, for the plaintiff to show that another brakeman had previously stepped upon the lid to the manhole on the same engine, with similar results. *Id.*

15. *Railroads—personal injury—evidence.* Where the right of a railroad company to the use and occupation of a city street is in common with that of the public, the public use is subservient to the rights of the railroad company as to the use of its tracks in the operation of its railway. Where, therefore, a person went upon a railway track on such a highway, to the rear of a train that was standing at the depot, and started to walk in the opposite direction from that in which the train was headed, without looking to see if there was a light on the rear end of the train, and without listening for the sounding of the bell or whistle, nor paying other attention to said train, because of the belief that it was going in the opposite direction, and she was presently struck by said train backing up, and killed, *held*, that, while she was not a trespasser, she was guilty of such contributory negligence as to preclude a recovery by her estate of the railroad company for causing her death. *Bryson v. C., B. & Q. R'y Co.*, 677.

16. ———— *judgment notwithstanding verdict.* The jury having found specially that the whistle was blown and the bell rung before the train commenced to back up, and that the bell continued to ring as the train was backing, and answered that they were in doubt as to whether the deceased was exercising ordinary care at the time of the accident, *held*, that the defendant was entitled to a verdict on the special findings. *Id.*

17. *Railroads—injury to brakeman—evidence.* In an action by a brakeman to recover for injuries received while in the act of coupling cars on the defendant's road it appeared that the earth between the ties at the point where the coupling was done had been washed out

NEGLIGENCE. CONTRIBUTORY NEGLIGENCE. *Continued.*

out to such an extent as to interfere with the duties of a brakeman at that point. The coupling was made in the night time, the brakeman was not familiar with the condition of the road, and it was necessary that he act with promptness in order to make the coupling, or allow the engine and car to come together, and then make an opening, so that he could go in slowly and do the work. *Held*, that the circumstances justified the brakeman in making the coupling while the cars were moving, and that he was not guilty of contributory negligence for so doing. *Horan v. C., St. P., M. & O. R'y Co.*, 328.

18. ————. In such case it was proper to permit the brakeman to describe to the jury the position he would have occupied if he had used the stick in making the coupling. *Id.*

19. *Proximate cause—rules of railroad company disregarded by employee—waiver.* The coupling in question was made by hand, contrary to a rule of the defendant that prohibited coupling by hand, and a coupling stick furnished by the defendant, and which said rule required should be used in making couplings, was returned by the brakeman to the agents of defendant from whom the same was received. *Held*, that it was properly left to the jury to determine whether the failure to use the coupling stick was the proximate cause of the injury, and that if the jury found that it was not, then the brakeman was not chargeable with contributory negligence because of the violation of the above rule. *Id.*

20. *Railroads—personal injury—evidence.* In an action to recover damages for the negligent killing of a man at a highway crossing, it appeared that the highway approached the crossing by a gradual descent until within thirty or forty feet of the railroad, from which point the road was level; that when the deceased was within thirty or forty feet of the crossing he could have seen the approaching train if he had looked, and that the train must then have been more than two hundred feet distant; that the dangerous character of the crossing was known to the deceased, but it did not appear that he stopped to look to see if any train was approaching, and according to the undisputed evidence of two witnesses he approached the crossing with his horse on a trot. *Held*, that the evidence of contributory negligence was such that a verdict for the plaintiff must be set aside. *Moore v. Keokuk & W. R'y Co.*, 223.

NEGOTIABLE PAPER. See Bills and Notes.

## NEW TRIAL.

## GROUNDS.

1. *Offer of incompetent evidence—prejudice.* In a prosecution for burglary, the county attorney offered, in the presence of the jury, to prove that the defendants had pleaded guilty to a burglary committed by them in another county. The evidence was rejected upon the

NEW TRIAL. GROUNDS. *Continued.*

defendant's objection, but the defendants, after a verdict of guilty, made the offer of the evidence a ground for a motion for a new trial. *Held*, that, while the offered evidence was clearly incompetent, and the very fact of offering it might have been prejudicial to the defendants, and the granting of a new trial on that ground would have been approved by this court, yet, whether the defendants were actually prejudiced was a question to be decided by the district court, in the exercise of a wise discretion, and, that court having denied a new trial on the ground stated, the supreme court would not interfere. *State v. Gadbois, 25.*

2. *Misconduct of jurors—discretion of court.* Where, in a criminal case a new trial was asked upon affidavits showing that two of the witnesses for the state, severally, and at different times, spoke to one of the jurors during the intermissions of the court, and while the trial was pending, eulogizing the prosecuting witness, and condemning the defendant; and that the foreman of the jury, during such an intermission, stated to a friend that court had to adjourn to give the prosecuting witness a rest, as the attorneys had worried him outrageously; and that the foreman, when the jury retired to consider its verdict, was apparently very anxious to procure a verdict against the defendant; and the trial court refused a new trial upon the case made, *held*, that the supreme court would not interfere, there being no showing that the juror encouraged the remarks of the witnesses, or believed what they said, or that the prosecution was in any way responsible for the irregularities complained of, or that the defendant was prejudiced thereby. *State v. Allen, 49.*

3. *Trial in criminal cases—reference to defendant's failure to testify.* Where the defendant's attorney, in his opening remarks to the jury, on a trial for forgery, stated that, if the case went so far that the defendant's evidence would be introduced, they would show who the guilty parties were; and the prosecuting attorney, referring thereto in his closing argument, said, in substance: "If the defendant or his attorney knew who the guilty party was, why did not they come on and prove it? The fact that they did not do so, shows guilt;" *held*, that these last remarks were not a violation of the statute which forbids the state to refer in argument to the fact that the defendant has failed to testify in his own behalf. *State v. Kidd, 54.*

4. *Trial for murder—jury in charge of unsworn bailiff—new trial.* The requirement of section 4442 of the Code, that the jury, when it retires to deliberate upon its verdict, shall be in charge of a sworn officer, is mandatory; but the fact that the bailiff who had charge of the jury in a criminal case was not sworn was no ground for a new trial, under section 4489 of the Code (which enumerates the grounds upon which new trials may be granted), where there was no showing that any prejudice resulted to the defendant from the fact that the bailiff was not sworn. *State v. Crafton, 109.*

NEW TRIAL. GROUNDS. *Continued.*

5. *Misconduct of counsel in examination of witnesses.* In a criminal prosecution for seduction the defendant's brother-in-law having testified in behalf of the former, was questioned on cross-examination by the state's attorney as to his relation to the defendant, and was then asked, "You made him marry her, didn't you?" to which question an objection was sustained. *Held*, that, while the question was inexcusable, yet that the question as to whether prejudice resulted therefrom was for the district court, and that the cause would not be reversed after the refusal of that court to grant a new trial when its discretion was fairly exercised. *State v. McIntyre*, 139.

6. *Misconduct of counsel in argument to jury.* Where counsel, in the course of his argument to the jury, read to it certain interrogatories which were to be submitted to it for its special findings, informed it that its special and general verdicts should be consistent, and told it what its findings should be to support a verdict for his client, *held*, that such conduct was not objectionable, and was not, therefore, ground for a new trial. *Powell v. Chittick*, 513.

7. *Special verdict—interrogatories submitted after argument commenced.* The submission to the jury of interrogatories propounded by one of the parties to a cause for a special verdict, which were not submitted to the attorneys of the adverse party until five or ten minutes after the opening argument to the jury had been commenced, *held*, to be sufficient ground for a new trial. *Humbert v. Larson*, 258.

8. *Compromise verdict.* A showing that the verdict in a case is the result of a compromise; that it is reported that one of the witnesses of the opposite party was paid for testifying as he did; and of newly discovered evidence which is merely cumulative, will not entitle a party to a new trial. *Bryson v. C., B. & Q. R'y Co.*, 677.

## MOTION.

9. *Amendment after three days.* A motion for new trial, upon the ground of alleged error in the instructions of the court to the jury, can not be amended after the expiration of three days after verdict so as to present, as ground for a new trial, the error of the court in failing to instruct the jury at all as to the burden of proof upon one of the issues in the cause. *Dutton v. SeEVERS*, 302.

## NOTICE.

## ACTUAL.

1. *Sale—possession—acknowledgment.* The acknowledgment of a bill of sale is immaterial as between the parties thereto, and as to such other persons as have actual notice of the sale; and possession of the goods by the purchaser named in the bill is actual notice to all the world of his interest in the property. *Franklin Sugar Ref. Co. v. Collier*, 69.

NOTICE. *Continued.*

## CONSTRUCTIVE.

2. *Deeds—record—lands located in unorganized county—construction of statute.* By an act of the legislature passed in the year 1853, Palo Alto county, was attached to the county of Boone, the purposes for which it was so attached not being specified. In the year 1855, the same county was attached to the county of Webster, "for election, judicial and revenue purposes." *Held*, that a conveyance of lands in Palo Alto county, made in the year 1857, was properly recorded in Webster county, and that such record was constructive notice to a subsequent purchaser after the organization of Palo Alto county. *Meagher v. Drury*, 366.

## NUISANCE.

See INTOXICATING LIQUORS.

## OFFICERS.

## COMPENSATION.

1. *Clerk of district court—fees in probate.* Under the provisions of section 16 of chapter 134, of Acts of the Twenty-first General Assembly, the clerk of the district court is not entitled to retain any part of the fees of his office in matters of probate and guardianship, except upon an allowance made by the board of supervisors, not exceeding the sum of three hundred dollars per year. *Poweshiek County v. Patton*, 308.

2. *Sheriffs—fees—expenses—construction of statute.* Under the provisions of section 4 of chapter 94 of Acts of the Nineteenth General Assembly, giving to the sheriff of a county "for each warrant served, two dollars, and the repayment of any amount actually paid out by him as necessary expenses in executing such warrant as sworn to," a sheriff is not entitled to repayment of money expended for a team and carriage necessary for his personal conveyance to the place of service of a warrant placed in his hands, nor for the proper feeding and care of a team while in use for such purpose. *Boyle v. Plymouth Co.*, 376.

3. *Road supervisors—payment for labor—construction of statutes.* Where upon a final settlement of the road supervisors with the township trustees, as provided in section 996 of the Code, a balance is found to be due a supervisor for his personal labor, and there are no funds in the hands of the clerk to pay such balance, the supervisor is entitled only to receive a certificate for the amount of labor performed, which may be used in the payment of his own highway tax for any succeeding years, as provided in section 3, chapter 200, of Acts of the Twentieth General Assembly; he is not entitled to an order payable in money from funds afterwards appropriated or belonging to his district. *Howegler v. Greiner*, 476.

ORIGINAL NOTICE.

SERVICE.

*Judgment—jurisdiction—defective service.* A judgment is not subject to collateral attack because of the defective service of the original notice, where the judgment recites that the defendant had due and legal service of the pendency of the action. *Rotch v. Humboldt College*, 480.

PARTNERSHIP.

DISSOLUTION.

1. *Notice of dissolution—rights of creditors.* K., the successor of a copartnership engaged in the banking business, of which H. was a member, having received several car loads of flax and oats as security for a claim due the bank, shipped the same to the plaintiff firm, and drew upon it for the value thereof. The transaction was an unusual one with the bank, but was necessary as a means of security, and a letter of advice written by K. to the plaintiffs, and signed by him as cashier, stated that the property was taken for a debt. No notice of the retirement of H. from the bank was published in the papers, nor was any notice sent to the plaintiff, but no drafts had ever been drawn on the plaintiff by the bank, or by either of its proprietors, while H. was a member of the firm. After K. succeeded to the ownership of the bank he conducted its business under the same names that had been used by the partnership, and in correspondence with the plaintiff used stationery that had been prepared for his predecessors, and upon which their names appeared, although over those names was stamped K.'s name as cashier. *Held*, in an action by the plaintiffs to recover the amount of an overdraft on account of said shipments, that the unusual character of the transaction, and the stamping of K.'s name over that of the former proprietors on the stationery, was not sufficient to charge the plaintiffs with notice of the change of the ownership of the bank, and that H. was liable to the plaintiff as one of the proprietors thereof. *Rosenbaum Bros. v. Horton*, 692.

2. ——— *instructions to jury.* The fact that the instructions in such case excluded from the consideration of the jury circumstances which should have caused a reasonably prudent person to make investigation which would have disclosed the facts in regard to the ownership of the bank, *held*, not to be prejudicial, as there were no circumstances of that kind shown by the evidence. *Id.*

CONTRIBUTION BETWEEN PARTNERS.

3. *Fraudulent conveyances.* Upon an attempted settlement between R. and S. as partners, it was found that the known debts of the firm could be paid with the sum of fifteen hundred dollars if S. would waive his claim against the firm, in partial satisfaction of which he had received a conveyance of the firm real estate. R. thereupon paid said sum of fifteen hundred dollars, but S. instead of waiving his

PARTNERSHIP. CONTRIBUTION BETWEEN PARTIES. *Continued.*

claim, assigned the same to his son, to whom he was indebted, but the assignment was made with intent to hinder and delay creditors. *Held*, that the assignment was fraudulent as against R., and that in an action by R. against S. for contribution, the latter was not entitled to credit for the amount of his claim, and also to the value of the real estate conveyed to him by the firm. *Runnels v. Smith*, 656.

## PAYMENT.

## WAIVER.

*Specific performance.* The sum paid by the plaintiff was ten dollars short of the amount agreed to be paid by him, but was received by the defendant without objection, upon the promise of the defendant to pay him the balance. *Held*, that the payment of the full amount at the time was waived. *Nilles v. Welch*, 491.

## PHYSICIANS.

## MALPRACTICE.

*Dismissal of patient before recovery—degree of skill required.* In an action against a surgeon for negligently dismissing the plaintiff from treatment for a fractured arm before the same was fully healed, the court instructed the jury that the defendant was liable, unless, in making up his mind to dismiss the plaintiff, the defendant exercised reasonable and ordinary care and skill, and had regard for, and took into account, the well settled rules and principles of medical and surgical science. *Held*, that the instruction was not erroneous as imposing a higher degree of care and skill than the law requires. *Mucci v. Houghton*, 608.

## PLEADING.

## CONSTRUCTION.

1. *Personal Injury—horse frightened by dog—exemplary damages.* In an action for damages for injuries sustained by reason of the plaintiff's horse being attacked by the defendant's dog on the public highway, whereby the horse was frightened and ran away, and the plaintiff was thrown upon a barbed wire fence, and injured, *held*, that an allegation in the petition that the defendants were the owners of the dog, and harbored and kept him "willfully, unlawfully and maliciously," with full knowledge of his vicious habits and practices, and made no effort to restrain him, nor to protect the public from his vicious attacks, was sufficient to support a recovery of exemplary damages, if established by the evidence. Whether proof of notice to the owner of the vicious character of the dog before the injury occurred is necessary to a recovery of actual damages in such case, *quære*. *Cameron v. Bryan*, 214.

2. *Exceptions to denial in answer—effect.* The plaintiff's petition alleged that one S. was the "sole and only heir at law" of the owner of said real estate, and the answer excepted from its denial of the

PLEADING. CONSTRUCTION. *Continued.*

allegations of the petition, the fact of the relationship of S. to said owner. *Held*, that, it not having been questioned in the district court that S. was the only heir, the admission of the answer would be considered in the supreme court as intended to admit the allegation of the petition in regard to the heirship of S. *Byers v. Johnson*, 278.

## ANSWER.

3. *Allegations treated as denied.* Where the allegations of an amendment to a petition are treated as denied on the trial in the district court without the filing of any pleading by the defendant, the plaintiff can not claim upon appeal that the facts alleged must be regarded as admitted. *Wright v. Waddell*, 350.

## AMENDMENTS.

4. *Amendment filed without leave of court—when stricken from files.* In an action against a sheriff to recover liquors taken under a search warrant, the plaintiff alleged in his petition that the property sought to be recovered was of the value of four hundred and eight and thirty-one hundredths dollars, which allegation was denied in the defendant's answer. Afterward, the liquors having been taken by the plaintiff from the possession of the defendant under a writ of replevin, and on the day the cause was set for trial, the defendant amended his answer, admitting the value of the liquors as alleged in the petition. On the same day, but after the jury was impaneled, the plaintiff, without leave of court, filed an amendment to his petition, placing the value of the liquors at one hundred and one dollars. *Held*, that it did not appear that the amendment was in furtherance of justice, and that the discretion of the district court was not abused in striking it from the files. *Schoenhofen Brewing Co. v. Armstrong*, 673.

5. *After testimony closed.* The acceptance of the order in controversy being alleged in the petition and denied in the answer, *held*, that the plaintiff was not prejudiced by the filing of an amendment to the defendant's answer at the close of the testimony alleging a parol agreement with the agent at the time of the delivery of the order that the same should be forwarded to the plaintiff for its approval and acceptance. *McCormack Harvesting Machine Co. v. Richardson*, 525.

## WAIVER OF DEFECTS.

6. *Failure to attack defective petition.* Although a petition be so defective as not to constitute a cause of action, if its sufficiency is not attacked by demurrer, its defects will be deemed waived, and the plaintiff will be entitled to recover upon proof of the facts alleged. *Manwell v. B., C. E. & N. E'y Co.*, 708.

7. *Filing petition—record.* Notwithstanding the provision of section 200 of the Code, that no pleading shall be considered filed until a memorandum of the date of filing has been entered on the appearance

PLEADING. WAIVER OF DEFECTS. *Continued.*

docket, a judgment rendered in a cause without such entry having been made is not void, and is not subject to collateral attack on such ground. *Rotch v. Humboldt College*, 480.

## WAIVER OF ERRORS.

8. *Bastardy—complaint—motion to quash.* The rules applicable to ordinary actions prevail in bastardy proceedings. Accordingly, where the defendant in such a proceeding moved to quash the complaint, and the motion was overruled, he waived his right to object to such ruling by pleading not guilty, and going to trial on such plea. *State v. Johnson*, 1.

9. *Answering after demurrer.* The right to a review, in the supreme court, of errors committed by the district court in overruling a demurrer to the plaintiff's petition is waived by the filing of an answer. *Manwell v. B., C. R. & N. Ry Co.*, 708.

## GENUINENESS OF SIGNATURE TO WRITTEN INSTRUMENT.

10. *Who may question.* The genuineness of a signature to a written instrument may be put in issue by a denial, under oath, by a party other than the person whose signature it purports to be, and the burden of proof as to such issue will be upon the party making the denial. *Shaw & Schoonover v. Jacobs*, 713.

## PRACTICE AND PROCEDURE.

## DISTRICT COURT RULES.

1. *Copies of pleadings—discretion of court.* Whether a pleading shall be stricken from the files because of the failure to file a plain copy thereof, as required by the rules of the district court, is a matter within the discretion of that court, and where, pending a motion to strike a petition because the copy thereof on file is blurred and illegible, the plaintiff filed a plain copy thereof, which filing was long before the trial, and the defendant was not prejudiced because of the character of the first copy, *held*, that the motion to strike was properly overruled. *Smith v. Harrington*, 603.

## EXAMINATION OF JURORS.

2. *Re-examination of jurors—discretion of court.* After a juror has once been examined and passed for cause, the allowance of a subsequent examination, upon a point overlooked by counsel in his first examination is a matter resting within the discretion of the court. *State v. Buxton*, 573.

## INTRODUCTION OF EVIDENCE.

3. *Title to real estate—sufficiency of plat.* Where, in an action to redeem property from a tax sale, it appeared that the identity of the property, as described in the deeds of both parties, was dependent upon a plat thereof, intended to be the deed of a corporation then

PRACTICE AND PROCEDURE. INTRODUCTION OF EVIDENCE. *Continued.*

owning the property, but which was signed and acknowledged only by one who was described as the president of such corporation, *held*, that, as the claims of both parties rested upon said plat, the defendants could not object to the introduction thereof in evidence upon the ground that it did not purport to be the act of the corporation, and was not attested by the corporate seal. *Paxton v. Ross*, 661.

4. ——— *tax sale—right to redeem—proof of title.* Under the provisions of section 893 of the Code, any right or interest in property will entitle a party to maintain an action to redeem the same from tax sale. Proof of absolute title is unnecessary. Where, therefore, in an action to redeem, the plaintiff having introduced, in proof of his chain of title, a deed made to one M. Thompson, of Washington City, District of Columbia, offered in evidence a deed purporting to be that of "Michael Thompson, of Honolulu, Sandwich Islands," but signed "M. Thompson," and the notary certified that "Michael Thompson" signed and acknowledged said deed, *held*, that the latter deed was properly admitted in evidence without proof that the grantee in the first deed and the grantor in the second deed were the same person. *Id.*

5. *Bastardy—recalling witness—facts overlooked.* It is no abuse of the court's discretion to allow the state in such proceeding to recall a witness, after the defendant has rested, to prove facts which might have been established on his first examination, but which were then overlooked. *State v. Johnson*, 1.

6. *Criminal cause—evidence in rebuttal.* Where, in a prosecution for burglary, several witnesses for the state, while it was introducing its evidence in chief, testified to the whereabouts of the defendants on a certain morning, and afterward the defendants introduced evidence to show that they were in another county on the morning in question, *held*, that it was no abuse of the discretion of the court to allow the state to call other witnesses, after the defendants had rested, to testify that the defendants were in the place stated by its first witnesses at the time referred to. *State v. Gadbois*, 25.

7. *Leading questions.* On the trial of an indictment for forgery, in altering certain special findings in a civil action, in which the defendant herein was plaintiff, the clerk of the court having testified that he kept the findings behind a pile of blanks in a particular case, was asked: "Could anyone see them there, on looking at the case, without reaching around behind the blanks?" *held*, that the question called for a fact, and not for an opinion, and that it was not objectionable as leading. *State v. Kidd*, 54.

8. *View of premises by jury—discretion of court.* In an action for the death of the plaintiff's intestate upon a railroad crossing, the court permitted the jury to view the scene of the accident; to which

PRACTICE AND PROCEDURE. INTRODUCTION OF EVIDENCE. *Continued.*

the defendant objected, on the ground that the premises might have been changed in the meantime. But *held*, that no such change could be presumed, in the absence of evidence thereof, and that permitting a view in such cases is a matter so much within the discretion of the trial court that this court can not interfere, where no abuse of that discretion is shown. *Banning v. C., R., I. & P. E'y Co.*, 74.

DISMISSAL OF CAUSES.

9. *Judgment—form of entry.* A dismissal of plaintiff's petition after a trial on the merits, affords no ground for complaint where it appears that the plaintiff was not entitled to recover, and it was so adjudged. *Edwards v. Louisa Co.*, 499.

SPECIAL FINDINGS.

10. *Right to have interrogatories submitted to jury.* The refusal to submit to the jury an interrogatory bearing upon an important question in a cause, and incident to the main issues, but not calling for the determination of an ultimate fact, is without prejudice, when such inquiry is covered by the instructions to the jury, and by special findings to other interrogatories. *State Bank v. Jennings*, 290.

11. *Interrogatories.* It is not error for the district court to refuse to submit interrogatories to the jury for special findings as to facts about which there is no controversy. *Citizens' State Bank v. Fuel Co.*, 618.

12. *Form of interrogatories.* A party is not entitled to have submitted to a jury for its special findings, any interrogatory having relation to facts which are not in dispute, or which embraces two or more questions, to which different answers might be returned. *Powell v. Chittick*, 513.

DIRECTING VERDICT.

13. *Such instruction need not be in writing.* A direction by the court to the jury in a cause to return a verdict for either party, need not be in writing; such direction not being an instruction within the meaning of sections 2784 to 2789 of the Code. *Leggett & Meyer Tobacco Co. v. Collier et al.*, 144.

See Criminal Law.

RAILROADS.

EJECTION OF PASSENGER.

1. *Action for damages—pleading.* Where, in an action to recover damages on account of an ejection from a railroad train for refusing to pay the fare demanded, the plaintiff relied in his petition, upon a contract with the railroad company as presented in a ticket purchased by him, *held*, that the plaintiff's right to recover must depend upon the contract contained in the ticket. *Dooley v. B., C. R. & N. E'y Co.*, 450.

RAILROADS. *Continued.*

## INJURY TO STOCK.

2. *Declarations of agents.* In an action to recover for the negligent killing of a colt by a railroad company, the admission in evidence of a statement made by the defendant's section boss and station agent in regard to the colt, which were not part of the *res gestæ*, nor shown to be authorized by the employment of the persons who made them, is erroneous. *Wall v. Des M. & N. W. Ry Co., 193.*

3. *What plaintiff must prove—instructions to jury.* The language of section 1289 of the Code, that to entitle the plaintiff in such action to recover, "it is only necessary for him to prove the injury to, or destruction of, his property," is not intended to dispense with all proof on the part of the plaintiff, except as to the fact of injury or destruction, and an instruction to the jury in the language of that part of the statute, without modification or explanation, is erroneous, and is to be deemed prejudicial, although the facts which the plaintiff is required to prove in order to recover are stated at length in another part of the charge. *Id.*

4. *Instructions to jury—questions not in dispute.* The facts alleged in the petition as constituting negligence being admitted by the defendant in its answer, and the only issue being whether the colt in question was in fact killed by the defendant, *held*, that the submission to the jury of the question whether the defendant was negligent in the operation of its trains was erroneous. *Id.*

NEGLIGENCE. See Negligence.

## REAL PROPERTY.

## TITLE.

1. *Easement—change of recorded agreement by parol—purchaser with actual notice.* One M., in his lifetime, conveyed to the plaintiff a right of way over certain land, which right, however, was to terminate upon the breach, by the plaintiff, of certain conditions named in the conveyance, which was duly recorded. Afterward, by parol agreement between M. and the plaintiff, these conditions were modified, and the plaintiff continued to enjoy the right of way under the modified conditions. Afterward M. died, and his executor conveyed the land in question to the defendant, the deed containing a reservation of the right of way. Moreover, the defendant, long before the time of his purchase, knew that the plaintiff was enjoying the right of way, with the acquiescence of M., without observing the conditions contained in the recorded agreement. *Held*, that the defendant was charged with actual notice of the oral agreement under which the plaintiff was enjoying the right of way, and that he purchased subject thereto, and could not be heard to say that the right of way was terminated on account of the plaintiff's failure to observe the conditions named in the recorded agreement. *Peterson v. Pierson, 104.*

REAL PROPERTY. TITLE. *Continued.*

2. *Alleys—adverse possession—limitation of actions.* Ten years of uninterrupted use and occupation of an alley under a conveyance, in which said alley was reserved as such to the grantors, but across which the grantee, during said period, maintained a fence, and upon which he paid the taxes and special assessments, is sufficient to constitute a title by adverse possession as against an adjoining lot owner, who has not claimed the right to use said alley for more than ten years. *Ritzmann v. Aspelmeier, 179.*

3. *Adverse possession—color of title—life estate insufficient.* Where a widow having a life estate only in an undivided one third of certain real estate, conveyed her interest to C., who conveyed to B., and the latter afterward quitclaimed his interest to the widow, who thereafter remained in possession of the property for more than ten years, but in conjunction with one of her children, who lived with his mother during his minority, and after attaining his majority built a house upon a part of the property, and occupied the same with his family, *held*, that the widow's possession was neither exclusive nor adverse, so as to give her title by adverse possession. *Smith v. Young, 338.*

4. *Reservation of mining right in deed—construction.* The claimants to certain real estate, while the title thereto was still in the government, transferred all their interest therein to an adverse claimant, reserving to themselves, however, the privilege of mining and drifting any crevice or range struck by them on their own ground through the land conveyed, and reserving, further, the privilege of sinking shafts on the latter by paying to said grantee one sixth of all the mineral discovered or raised as rent on the conveyed premises. Subsequently said grantee acquired title to said premises from the government, and by successive conveyances, made subject to the rights of the above grantors, they become the property of the plaintiff's devisor. The defendant claims to have acquired said mining right by purchase from said grantors, or those claiming under them, and had mined on said premises almost continuously for about thirty years when this action was commenced to quiet the title thereto in the plaintiff. Before his death the plaintiff's devisor paid the defendant for ore mined on said lands. *Held*, that the reservation in said original deed was not that of a mere life estate, which terminated with the death of the grantors in said deed, nor a personal privilege or license only, which could not be assigned, but gave the grantors and their grantees a continuing right to mine through said premises, limited only by the extent of the range that should be discovered. *Bonson v. Jones, 380.*

**REAL PROPERTY. TITLE. Continued.**

absence of such evidence, the title to a permanent dwelling on said premises, voluntarily erected by the defendant, should be quieted in the plaintiff. *Id.*

6. *Purchase of outstanding title by tenant in common—effect.* Where, upon the foreclosure of a mortgage against property held in common, the property is bid in at the foreclosure sale by one of the cotenants, he can not, upon acquiring a sheriff's deed under such sale, claim absolute title to said property to the exclusion of his cotenants, but will have his interest therein increased merely to the extent of the amount necessary for the cotenant to redeem his undivided share. *Moy v. Moy, 511.*

7. *Quitclaim deed—construction—record.* C., having purchased certain real estate with funds belonging to the estate of I., conveyed the same to I.'s widow, who in turn, conveyed it to the executor of I.'s estate. Each of said conveyances purported on its face to convey in the grantor's own right, and there was no indication in either of them that the conveyance was in trust. After the death of I.'s widow, said executor conveyed said land to E. C., R. M., L. M. and E. M., the only surviving heirs of I., jointly, the first of whom, under the laws of descent, being entitled to one half of said property, and the others to the remaining half, but their respective interest were not specified in the deed. Thereafter L. M. and E. M. quitclaimed their respective interests to R. M., who conveyed to the plaintiffs by deed reciting, that he had granted, bargained, sold, etc., all of his right, title and interest in the property described. *Held*, that the deed to the plaintiffs was in effect a quitclaim deed and that the plaintiffs took thereunder only the interest of R. M., which was an undivided one half. *Rogers & Maguire v. Chase, 468.*

8. *Resulting trust—attachment.* Where, upon an attachment of real estate as the property of the husband, the wife intervened, claiming that the property was purchased by her husband as her agent, and with her money, and that his conveyance of the same to her after the attachment, was in pursuance of an agreement made by him when she first discovered that the property had been taken in his name, and the wife's testimony was confirmed by that of the husband, but it appeared some of the tax receipts were issued to the husband, that several witnesses had heard the husband and wife speak of the property belonging to the former, that the husband contracted for the property about ten months before his marriage, made a lease of the property and received the rent, and executed a mortgage, on a portion thereof, in which the wife joined to release her right of redemption, that the husband and wife, on the trial, were

REAL PROPERTY. TITLE. *Continued.*

9. *Evidence—sufficiency of plat.* Where, in an action to redeem property from a tax sale, it appeared that the identity of the property, as described in the deeds of both parties, was dependent upon a plat thereof, intended to be the deed of a corporation then owning the property, but which was signed and acknowledged only by one who was described as the president of such corporation, *held*, that, as the claims of both parties rested upon said plat, the defendants could not object to the introduction thereof in evidence upon the ground that it did not purport to be the act of the corporation, and was not attested by the corporate seal. *Paxton v. Ross, 661.*

See Equity, 2; Former Adjudication, 1.

RECORDING LAWS. See Conveyances, 5.

## REMEDY.

## ELECTION.

1. *Arbitration—validity of award—election of remedies.* Where the report of arbitrators fails to show affirmatively that the arbitrators were sworn, it will be presumed, in the absence of a showing to the contrary, that the arbitrators complied with the law in this respect, or that the parties waived their making an affidavit, and if the submission and award otherwise conform to the law relating to arbitration, the party in whose favor the award is, can not, after it is rendered and placed in the hands of the clerk of the court, at his election, sue thereon or pursue the statutory provisions for judgment, but must be content with the further statutory remedies. *Older v. Quinn, 445.*

2. ———— *construction of statute.* Section 3431 of the Code providing that the statutes relating to arbitration shall not affect "the control of the court over the parties, the arbitrators or their award; nor impair or affect any action upon an award," relates to the jurisdiction of the court over common law awards, and does not entitle a party who has secured an award upon a statutory arbitration, to abandon the statutory remedies for judgment thereon and sue upon it as a common law award. *Id.*

## REPLEVIN.

## PLEADING.

1. *Attachment—intervention—burden of proof.* A petition of intervention in an action by attachment, wherein certain personal property had been seized, alleged that at the date of the levy, and at the time of filing of said petition, the intervenor was the owner of the property, and that he acquired such ownership by purchase from time to time of the attachment defendant, and the same were in his possession at the time of the levy of the attachment. The attachment plaintiff, for answer to said petition of intervention, denied that

**REPLEVIN. PLEADING. *Continued.***

the intervenor was on the day when he filed his petition the owner of the property, or entitled to its possession. *Held*, that the burden was upon the intervenor to prove that he was the owner of the property at the date of filing his petition. *Lagomarcino v. Quattrochi*, 197.

**WHEN WRIT WILL LIE.**

2. *Property taken under search warrant.* Replevin will not lie to recover the possession of intoxicating liquors taken by a sheriff, and held by him, by virtue of a search warrant duly issued in pursuance of the police regulations of the state. *Schoenhofen Brewing Co. v. Armstrong*, 675.

**RESIDENCE.** See Attachment, 1.

**SALES.**

**CONTRACT.**

1. *Acceptance necessary to complete contract.* An order or request in writing, addressed to a dealer or his agent, to ship to the writer, on or about a date named, goods of a kind specified, for which the writer agrees to pay a price named, does not constitute a contract until accepted or acted upon by the vendor, and may be withdrawn at any time before acceptance. Hence, where such an order directed that the goods specified be shipped three months after the date of the order, and the vendor gave no indication of the acceptance of the order until the date named, when he shipped the goods, *held*, that the vendee was not then bound to receive them. *McCormack Harvesting Machine Co. v. Richardson*, 525.

**WHEN TITLE PASSES.**

2. *Delivery—order of vendee subsequently countermanded.* Where, after an order for goods is accepted and acted upon by the vendor, by delivering the same to a railroad company for carriage, the vendee countermanded the order, but the countermand was not consented to by the vendor, and the goods were afterward received by the vendee, and subsequently mortgaged by him as his own property, *held*, that the title to the goods passed to the vendee upon delivery to the carrier, and became complete as against any right of the vendor to recall the same upon the acceptance thereof by the vendee, and that the vendor could not thereafter recover possession of the same as against the mortgagee under said mortgage. *Leggett & Meyer Tobacco Co. v. Collier et al.*, 144.

**PERFORMANCE.**

3. *Action for price—performance by vendor.* A contract for the sale of a monument provided that there should be an inscription on the dye "including four lines of verse," which were not specified in the contract. *Held*, that it was the duty of the vendees to furnish such

SALES. PERFORMANCE. *Continued.*

inscription, and that they could not, by refusing to furnish the same, defeat an action for the price. In such case the vendor is entitled to recover the purchase price, less the cost of making the inscription. *Eastern Granite Co. v. Heim, 698.*

4. ————. It being provided in said contract that the inscription should be in German, *held*, that the vendor was properly permitted to prove that it is usual to use the latin letter in German inscriptions on granite monuments. *Id.*

## VALIDITY.

5. *Delivery—title conditioned on payment—innocent purchaser.* The delivery of personal property under an agreement that the party receiving the same shall either return the property or pay the owner a sum named, is a conditional sale, and, unless reduced to writing, and duly acknowledged and recorded, as required by section 1922 of the Code, is invalid as against an innocent purchaser without notice. *Wright v. Barnard Bros., 166.*

6. *Possession sufficient—acknowledgment.* The acknowledgment of a bill of sale is immaterial between the parties thereto, and as to such other persons as have actual notice of the sale; and possession of the goods by the purchaser named in the bill is actual notice to all the world of his interest in the property. *Franklin Sugar Ref. Co. v. Collier et al., 69.*

7. *Consideration—pre-existing debt.* A pre-existing debt is not a sufficient consideration to support a sale of personal property as against one from whom said property was fraudulently obtained by the vendor. *Beed, Murdoch & Co. v. Brown Bros., 554.*

8. ———— *promise of payment.* Neither will a promise to pay for goods so obtained by the vendor give title to the vendee as against the real owner. *Id.*

9. *By agent of property belonging to principal—title of vendee.* The plaintiffs advanced money to L. & Co., with which to purchase flax seed for the purpose of loaning it to farmers, with a view to procuring the product of the seeding, under an agreement that all seed purchased should become the sole and absolute property of the plaintiff, and that L. & Co. should have no interest therein nor lien thereon, save for money actually advanced, and that so long as it remained in the hands of L. & Co. they should hold it only as agents of the plaintiff. L. & Co. having purchased seed with money thus advanced by the plaintiff, and sold the same to the defendants, *held*, that, although L. & Co. were, under said agreement, obliged to guarantee the weight of the seed at the point where it was to be received by the plaintiff, and were responsible for damages resulting from shipments of un-

**SALES. VALIDITY. *Continued.***

merchandise seed, the money advanced was not in the nature of an extension of credit, nor was the transaction a conditional sale, but that the seed purchased belonged to the plaintiff, and that L. & Co., by selling it as their own, could not give the defendants title thereto, although at the time of said sale the bins of L. & Co. were filled, and they were obliged to ship the seed in question away for want of room. *Gilman Linseed Oil Co. v. Norton & Worthington, 434.*

10. ——— *estoppel.* Although the possession and control of personal property be given to an agent, who is engaged in the business of buying and selling property of like character, yet the agent in fact have no authority to sell, the principal will not be estopped from claiming the property as against an innocent purchaser without notice, to whom the property was sold without authority, and without the knowledge of the principal. *Id.*

11. ———. The fact that the plaintiffs, after receiving information of the sale to the defendants, attempted to procure a settlement with L. & Co. for the value of the seed sold, and made no demand of the defendants therefor until after the commencement of this action, *held*, not to estop them from asserting their claim against the defendants for the value of the property. *Id.*

12. *Fraud—evidence.* In an action upon a check given for hogs, it was shown that the payee warranted the hogs to be sound, but that some of them died soon after their removal from the payee's yard to that of the drawer. It was not shown that the hogs were infected when sold, nor of what disease they died, nor that the payee knew that the hogs were diseased at the time of the sale. *Held*, that there was no evidence to submit to the jury upon the question of fraud in the sale of the hogs. *Shaw & Schoonover v. Jacobs, 713.*

13. *Representations—fraud.* Representations by a vendor which amount to mere words of commendation of the thing sold, though false, do not amount to such fraud as will entitle the vendee to avoid the sale. *Eastern Granite Co. v. Heim, 698.*

See Corporations, 2, 3, 4.

**RESCISSIION.**

14. *For fraud—representations—intention—evidence.* The fact that an insolvent orders goods on credit is not fraudulent, unless coupled with an intent not to pay for them, or unless the natural and probable, if not necessary, result of his act is to defraud the seller. And in this action to rescind a sale of sugar, and to recover the goods, upon the ground of fraudulent representations, where the evidence showed that the buyers were much in debt at the time, but failed to show that they were insolvent, or that the purchase was made with any fraudulent intent, or by means of fraudulent representations, except the statement that they were now through with their canning business,

SALES. RESCISSION. *Continued.*

and would thereafter have plenty of money, and discount their bills promptly, *held*, that the court properly directed a verdict for the defendant. *Franklin Sugar Ref. Co. v. Collier et al.*, 68.

## WARRANTY.

15. *Auctions—false representations—liability.* The public proclamation to the bidders present at a public sale of hogs, that the hogs "are as thrifty and healthy a lot of hogs as the owner had ever owned in his life, and that he had been in the hog business a good many years," amounts to a warranty of soundness, and is a representation of the fact of their health and soundness as well, which, if false, will constitute ground for an action for fraud and deceit. *Stevens v. Bradley & Son*, 174.

16. *Declarations of vendor.* An affirmation by a vendor preceding a sale of hogs at public auction, to persons assembled for the purpose of bidding at such sale, that the hogs to be sold were "all right," the representation being made to effect a sale of the hogs, is a warranty that the hogs were not at the time infected with "hog cholera, swine plague, or other infectious disease," and a purchaser at such sale, relying upon such representation, would be entitled to recover damages for a breach of warranty, although he had expressed himself prior to the sale, after looking at the hogs, that "he had made up his mind to buy some of the hogs, if they went cheap enough." *Powell v. Chittich*, 513.

17. *Implied warranty—pleading.* In an action upon a promissory note given for the purchase price of a stallion, the defendant pleaded a failure of consideration based upon the fact that the horse was represented to be a sure foal getter and healthy, when in fact he was not. In another division of the answer the defendant alleged that the sale of said stallion was accomplished by fraud, and in yet another division averred special damage because of said fraudulent representations. The bill of sale transferring said stallion, and which was attached to the defendant's answer, provided that if said horse proved barren, the vendors would, at their option, refund the money paid therefor, or furnish another horse in his place. *Held*, that the question of implied warranty was not presented by the pleadings. *Humbert v. Larson*, 258.

18. *Delivery of goods of inferior quality—acceptance by vendee—damages.* Where, upon a sale of lumber, the kind delivered to the vendee was of an inferior quality and of different dimension from that agreed to be furnished, but the same was accepted by the vendee with knowledge of the defects, and without complaint until about four months after delivery, and after a part of the price had been paid, *held*, that the vendee was not entitled to recover the actual damages sustained by reason of the difference in the kind and quality of the lumber furnished. *Berthold & Jennings v. Mfg. Co.*, 506.

SALES. WARRANTY. *Continued.*

19. *Implied warranty.* The quality and dimension of the lumber to be furnished being specified in the contract, *held*, that there was no implied warranty that the lumber furnished should be fit for the purpose for which it was intended. *Id.*

20. *Breach—damages.* A contract of warranty on the sale of a stallion provided that if the stallion was not a reasonably sure foal getter the vendee could return him, in as good condition as he was then in, and the vendor would exchange him for another stallion, giving or receiving the actual difference in the value of the two animals. The horse having died before the result of his services could be known, *held*, that the return of the horse in the event of a breach of the warranty was optional with the vendee, and that his failure to return him would not defeat the vendee's right to recover damages for a breach of the warranty. *Love & Co. v. Ross et al.*, 400.

21. ——— *damages—measure of.* The measure of the vendee's damages in such case is the difference between the value of the horse as he was and as he was warranted to be, and the expense incurred by reason of his not being as warranted. The difference in the amount realized in the services of the horse, and what would have been realized had the horse been as warranted is not recoverable. *Id.*

22. *Breach—evidence.* Where in an action for damages for a breach of the warranty implied by law in the sale of a threshing machine, the defendant's answer was a general denial of the allegations of the petition, except as to the fact of the sale, and the evidence showed an express warranty in writing by the vendor relating to the same subject and obligations as would be included in the implied warranty, but conditioned upon notice being given the vendor of any defects within one week after the machine was put in operation, *held*, that an instruction withdrawing said express warranty from the consideration of the jury was erroneous, and was prejudicial to the defendant. *Bucy v. Pitts Agricultural Works*, 464.

23. *Action on express warranty—instruction to jury.* In an action upon an express warranty in the sale of a horse, an instruction that "if no representations were made at the time of sale, but the plaintiffs looked him (the horse) over, and took him upon their own judgment, without asking anything about the horse, then they can not recover in this action, and your verdict will be for the defendant," is approved. *Douglass & Hemingway v. Moses*, 40.

24. *Breach—measure of damages.* For the breach of an express warranty in the sale of a horse, the measure of damages is the difference between the actual value of the horse at the time of the sale, and what he would have been worth if he had been as represented or warranted, as shown by the evidence. *Id.*

**SALES. WARRANTY. Continued.**

25. *Express warranty—time of making.* A binding express warranty in the sale of a horse may be made after a part of the purchase price has been paid, and before the horse has been delivered and the remainder of the price paid. *Id.*

26. *Agreement in event of breach—rights of vendee.* The sale of a stallion under a warranty, that he is a breeder, and the agreement that if he does not give satisfaction he "may be exchanged for another of equal value," will not preclude the vendee, in the event of a breach of the warranty, from keeping the horse, and refusing to pay therefor beyond his actual value. *Hefner v. Haynes, 616.*

**SEDUCTION.** See Criminal Law.

**SETTLEMENTS.** See Contracts, 1; Criminal Law, 23.

**SHERIFFS.** See Officers, 2.

**STATUTE OF FRAUDS.** See Contracts, 9; Mortgages of Real Estate, 2.

**SUBROGATION.** See Mortgages of Real Estate, 6.

**TAXATION AND TAX TITLES.****TAX SALE.**

1. *For taxes not carried forward—validity—construction of statute.* Section 845 of the Code, providing that any sale for delinquent taxes, not brought forward on the tax book, shall be invalid, is not in conflict with chapter 79 of the Acts of 1876, authorizing the sale of property which remains liable to sale for delinquent taxes, and which has been advertised and offered, and passed for want of bidders, for two or more years; and a sale made under the latter statute, for taxes which have not been carried forward is invalid. *Paxton v. Ross, 661.*

**TAX DEED.**

2. *Issued to grantee of mortgagor—validity against mortgage—delay in procuring deed.* A tax deed, issued eleven years after the tax sale, to the grantee of one who was the owner of said property at the time of the sale, will not give to said grantee, and those claiming under him, a title to said real estate superior to a mortgage made by said owner, and which was duly recorded prior to the conveyance to said grantee. *Doud v. Blood, 237.*

**REDEMPTION.**

3. *Right to redeem—proof of title.* Under the provisions of section 893 of the Code, any right or interest in property will entitle a party to maintain an action to redeem the same from tax sale. Proof of absolute title is unnecessary. Where, therefore, in an action to redeem, the plaintiff having introduced, in proof of his chain of title, a deed made to one M. Thompson, of Washington City, District of Columbia, offered in evidence a deed purporting to be that of "Michael

TAXATION AND TAX TITLES. REDEMPTION. *Continued.*

Thompson, of Honolulu, Sandwich Islands," but signed "M. Thompson," and the certificate of the notary recited that "Michael Thompson" signed and acknowledged said deed, *held*, that the latter deed was properly admitted in evidence without proof that the grantee in the first deed and the grantor in the second were the same person. *Paxton v. Ross*, 661.

## TRUSTS.

## IMPLIED.

*Homestead—purchased by husband, but title taken in wife's name.* Where, upon a sale of a homestead, purchased by a husband with his own money, the wife refused to join in the conveyance thereof, unless the deed for property to be purchased with the proceeds of said sale was made to her, and the husband consented to have the deed so made, upon being advised that if the property was to be occupied as a homestead neither he nor his wife could alone dispose of, or incumber the same, and thereafter the wife procured a divorce from her husband, and occupied the property thus conveyed to her with a second husband and her children, *held*, that the evidence was insufficient to establish a trust as to said property for the benefit of the husband and his children. *Rogers v. McFarland*, 286.

UNLAWFUL ASSEMBLY. See Criminal Law, 40.

## VENUE.

## PLACE OF COMMENCING SUIT.

1. *County where contract is to be performed.* The right to maintain an action upon a contract in the county where the contract is by its terms to be performed is not affected by an allegation in the petition excusing complete performance of the contract by the plaintiff because of some default of the defendant. *Eastern Granite Co. v. Heim*, 698.

## CHANGE OF.

2. *Discretion of district court.* The allowance of a change of venue in a criminal cause on the ground of excitement and prejudice on the part of the people of the county is a matter within the jurisdiction of the district court, and a showing on the part of the state by counter affidavits to the effect that there was but little discussion in the county in regard to the merits of the case, and that there was neither excitement nor prejudice against the defendant, is sufficient to support its action denying a change. *State v. Belvel*, 405.

See Criminal Law, 17.

## VERDICT.

## SPECIAL FINDINGS.

*Questions must be material—railroads—warning of danger.* In such case, where the evidence showed that, as the plaintiff's intestate was approaching the crossing, someone remarked, "You had better hold up; the train is coming," it was error for the court to submit to the jury the question whether the deceased had reason to believe that the remark was addressed to parties other than himself, as the only material question was whether he heard it. *Banning v. C., R. I. & P. R'y Co.*, 74.

WAIVER. See Damages, 12; Insurance (Fire), 1; Negligence, 10, 19; Payment; Pleading, 6, 7, 8, 9.

WARRANTY. See Damages; Sales.

## WILLS.

## AGREEMENTS TO DEVISE.

1. *Parol agreement to make one devisee—evidence.* In an action against the administrator and heirs of the estate of a decedent to enforce specific performance of an alleged agreement between the plaintiff and said decedent, whereby the latter was to will the plaintiff all of her property, if he would live with, and take care of, her as long as she lived, it appeared that the deceased was seventy years old when she died, and had an estate valued at about six thousand dollars; that the plaintiff had been raised and educated by the deceased and her husband, and that he returned from school and took up his abode with the deceased only about three months before she died; that the alleged oral agreement to devise all of her property to the plaintiff consisted of statements and declarations made by the deceased during these few months preceding her death; that, after her death, the plaintiff claimed certain articles of personal property when the administrator was preparing his inventory, bid in certain property at the administrator's sale, giving his notes therefor, filed a claim for two months' work rendered the deceased, and did other acts inconsistent with his claim herein of the alleged contract. *Held*, that the agreement was not established by the evidence. *Brown v. Garten*, 573.

## CONSTRUCTION.

2. *Condition of devise—election of devisee.* By the terms of a will the homestead was given to the testator's daughter, "provided that my said daughter \* \* \* shall make my said homestead her home; otherwise she is to receive in lieu thereof the sum of three hundred dollars." *Held*, that the devise was conditioned upon the daughter's occupation of the homestead, and that by abandoning the homestead and taking up her residence elsewhere, she elected to take the bequest of three hundred dollars in lieu of the devise. *Grindem v. Grindem*, 295.

See Estates of Decedents, 4.

## WITNESSES.

## COMPETENCY.

1. *Transactions with party deceased—form of objection.* In an action brought by a banking company upon a promissory note, to which, it was alleged, the defendant's name had been signed, under his direction and authority, by his wife, since deceased, *held*, that a witness who was the owner of said bank, transacted all the business touching the execution of said note, and who was interested in the result of said action, was not competent to testify as to the circumstances that led to the making of said note, why the maker wanted the money, when it would be paid, and the source from which it was expected to procure money for payment. Whether an objection to such evidence as "incompetent and immaterial" is sufficient to raise the question of the right of the witness to testify as to personal transactions with one deceased, *quære*. *Banking Co. v. Cole*, 211.

## CREDIBILITY.

2. *Credibility—instructions to jury.* The district court being asked to instruct the jury that if they found that any witness in the case had knowingly sworn falsely in relation to any material matter or statement, then they might disregard the entire evidence of such witness, gave such instruction with the addition, "But you are not bound to do so if you still believe it worthy of credit." *Held*, that the additional words did not change the legal effect of the instruction asked. *State v. Baker*, 188.

## WORDS AND PHRASES.

## RESIDENT.

*Temporary residence in state.* A farmer temporarily residing in this state for the purpose of feeding cattle, with the expectation of ultimately returning to Kansas, where his wife and children reside, is not a resident of this state. *State Bank v. Jennings*, 230.

*Ex. L. B.*

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